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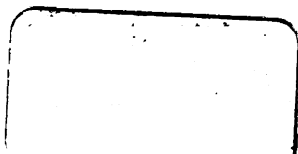
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HARV SCHOOL



July 9

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PRACTICE REPORTS

IN THE

SUPREME COURT

AND

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

By NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW YORK.

VOLUME XLVIII.

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PRACTICE REPORTS.

SUPREME COURT.

KATHARINE WRIGHT *et al.* agt. GEORGE S. WRIGHT, administrator, *et al.*

Marriage

Marriage is established by and founded upon *civil contract*. It is not necessary to its validity that it should be solemnized in any particular form, or that the intervention of any priest or magistrate is at all needed to make the contract binding.

All that is necessary for its validity in this state is the deliberate consent of competent parties entering into a present agreement to take each other as man and wife.

This contract may be proved like any other fact, either by positive evidence of the agreement, or by evidence from which it may be inferred.

Special Term, February, 1874.

Abbott Brothers, for plaintiffs.

Foster & Thomson, for defendants.

VAN BRUNT, J.—It must be regarded as the settled law in this state that it is not necessary, in order to make a valid marriage, that it should be solemnized in any particular way, or that the intervention of any priest or magistrate is at all needed to make the contract binding.

In this state it is regarded simply as a civil contract, and all that is necessary for its validity is the deliberate consent of competent parties entering into a present agreement to

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take each other as man and wife. This contract may be proved, like any other fact, either by positive evidence of the agreement or by evidence from which it may be inferred. It is equally well settled in this state that cohabitation between man and woman, as man and wife, and their being generally known among their friends and acquaintances as such, is evidence from which a marriage may be inferred.

Before we proceed to apply these few general principles to the present case, it will not be amiss to examine the reported cases briefly, and see what kind of cohabitation and reputation has been required in them.

The earliest reported case in our state is that of *Fenton agt. Reed* (4 *John. R.*, 52). The question in that case was whether the plaintiff was the widow of one William Reed. The facts of the case were these: In the year 1785 the plaintiff was the lawful wife of John Guest. Some time in that year Guest left the state for foreign parts, and continued absent until some time in the year 1792, and it was reported and generally believed that he had died. The plaintiff, in 1792, married Reed. In that year, and subsequent to the marriage, Guest returned to this state, and continued to reside therein until June, 1800, when he died. He did not object to the connection between plaintiff and Reed, and said that he had no claim upon her, and never disturbed the harmony between them. After the death of Guest, the plaintiff continued to cohabit with Reed until his death, in September, 1806, and sustained a good reputation in society; but no solemnization of marriage was proved to have taken place between the plaintiff and Reed subsequent to the death of Guest. Upon these facts the court held that, as a marriage may be proved, in other cases than in prosecutions for bigamy and criminal connection, from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred, a jury would have been warranted to have inferred an actual marriage after the death of Guest.

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The case of *Jackson agt. Clair* (18 *John. R.*, 346), the question was: Was the plaintiff the wife of John A. Van Buskirk? and the following were the facts:

In October, 1779, John A. Van Buskirk hired a room at Fishkill for himself and a woman called his wife, and a child named John. The woman's name was Blann, and they both said they were married. They occupied the room until 1780, when Van Buskirk removed, with his family, to New Marlborough, where he remained about a year. In April, 1781, Van Buskirk came back to Fishkill, and said that he and his wife had parted, and that she had gone to Long Island to her friends. Six months afterward, Van Buskirk married the plaintiff, and they lived together as man and wife for a period of nearly forty years. The last heard of the first wife was in 1813, when it was reported that his first wife was living, and was then on her way to Nova Scotia.

The court say that upon the above facts the intercourse between Van Buskirk and Jane Blann might be presumed to be meretricious, but that it was not necessary to place the plaintiff's rights on that ground, as upon the authority of *Fenton agt. Reed* (*supra*), there being proved cohabitation for twenty-seven years after the first wife was heard from; also reputation of marriage and a good character in society, very strong presumptions of an actual marriage, after the presumed death of Jane Blann, were established, which were much stronger than in the case of *Fenton agt. Reed*.

The next case upon this subject is that of *Rose agt. Clark* (8 *Paige*, 573).

Abigail Rose was married to Jonas Frink about 1790, and after living together a short time they separated. Frink married another woman, but returned to this state and died October 24, 1830. Some ten years after Mrs. Rose and her husband, Frink, had parted, she was living with J. Owens, as his housekeeper. She was then married to S. Thruston, who left her next day, and never after claimed her as his wife. She afterward lived with Owens, as his wife, and passed by

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his name until his death, in March, 1826. Two or three years after Owens' death she was married to Rose, and they lived and cohabited together until the death of Rose, in January, 1838. Both of them sustained fair characters during that time, and Rose frequently, after the death of Frink, recognized her as his wife. She joined with him, as his wife, in a deed of lands. The children of a prior marriage recognized her as the wife of Rose, and called her mother; and Rose always, in speaking of her to others, called her as his wife.

The chancellor held that these facts raised a presumption of a marriage between the plaintiff and Rose subsequent to the death of Frink, but he is careful to add to his decision that the mere fact of a man and woman living together and carrying on an illicit intercourse is wholly insufficient to raise a legal presumption of marriage, as it too often happens that such cohabitation takes place when the intercourse between the parties is clearly meretricious. The presumption of marriage only arises from matrimonial cohabitation, where the parties not only live together as husband and wife but hold themselves out to the world as sustaining that honorable relation to each other. And he also adverts to the fact that where the cohabitation is meretricious, that the man frequently attempts to give his mistress a different character from what she in fact sustained toward him.

In the case of *Clayton agt. Wardell* (4 Coms. R.), the following facts appear:

One Schenk, being the reputed father of a child with which Sarah Maria Young had become pregnant, was, on the 22d of November, 1822, arrested as such putative father, under the provisions of the bastardy act, and entered into the usual recognizance to answer to the charge, and no further proceedings were had thereon. In the early part of May, 1823, Sarah Maria was delivered of a child, which lived about eleven months and then died. After the birth of the child, and while it lived, Schenk, for some part of the time at least, cohabited with Sarah Maria, who lived with her mother. It

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was understood among the relatives of Schenk that they were married, and Sarah Maria was received by them as his wife and the child as his child. The relatives of Sarah Maria testified that they never heard her called by any name otherwise than that of Young prior to her subsequent marriage with Messerve, and the connection with Schenk was looked upon by them as disreputable. Very soon after the death of the child, as early at least as the summer following, Schenk ceased to cohabit with Sarah Maria, and in June, 1825, an instrument was executed between them, in which they are described as husband and wife, and by which they mutually agreed to a separation. Sarah Maria Young was, within a month of the time when the articles of separation are alleged to have been executed, married to one Messerve.

The question was whether these facts warranted the legal presumption of a marriage between Schenk and Sarah Maria Young. The court decided that they did not. It is to be observed, however, that the decision was made on a vote of five to four. The grounds upon which the decision was based are: that the commencement of the cohabitation being meretricious it is presumed to continue so until the contrary is shown; that the reputation was divided; also, the legal presumption was relied upon that there is a strong legal presumption against the commission of a crime.

The next case was that of *Canjolle agt. Ferrie* (23 N. Y. R., 90), which is particularly relied upon by the plaintiffs.

The question was whether John P. Ferrie was the legitimate or natural son of Jeanne Du Six, by one Valentine Ferrie. The deceased, whose original name was Jeanne Jeaid, was a native of Pau, a city in the south of France, where she was born on the 24th of November, 1777. She was the daughter of John Jeaid and of Magdalen Reviere, people of humble condition, residing at Pau. About the year 1798 Jeanne went to St. Gouris and became a servant of one Anire, a merchant. Here she formed an intimacy with Valentine Ferrie, a tanner, and the next-door neighbor of Anire, the

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result of which was that she was likely to become a mother. The father of Valentine objected to his marrying her, as he was desirous of doing, on account of their inequality of social condition, the family of Ferrie being small proprietors, and the friends of Jeanne being poor and herself a domestic servant. Shortly after her confinement she left Anire's for a house in the outskirts of the city. Ferrie abandoned his father, and, in defiance of his authority, went to live with her there, and on the 30th of June, 1800, she gave birth to the defendant. On the 4th of May, 1800, an entry was made in a register of publications of marriage in the archives of mayoralty of St. Gouris, giving notice that Valentine Ferrie and Jeanne Jeaid intended to execute the acts of their marriage on the twentieth of that month. No entry of any civil act of marriage could be found in the archives of the city. Witnesses were examined, who testified that the defendant was called Ferrie in the presence of Valentine, and that Jeanne was called Ferrie by Valentine and by others, and that Valentine and Jeanne lived together as husband and wife.

The court, in considering this evidence, admit that it is a well settled rule that if a cohabitation is illicit at its commencement the presumption of the law is that it so continued, and there must be some circumstance to show that it has been changed. In the case then under consideration the circumstances which indicated the change are given in the opinion of the court in the following language :

It must be assumed that both parents were aware of the necessity of this change. The father, it is clear, not only intended marriage but was most anxious and determined to consummate it. The only difficulty arose from the opposition of his father, and it is quite clear to my mind that he determined to brave that, though it deprived him of a home, the association and friendship of his family, and the disruption of his business relations. His flight from his father's house can only be accounted for on the assumption of his intention to marry Jeanne. Neither his father nor any other member of

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his family objected to his connection with the respondent's mother as his mistress, but, to secure his marriage with her, flight from his home and estrangement from them were the inevitable necessity and result. These he met for this purpose; and when we see that such estrangement continued, and friendly relations with them were never resumed, can we doubt that he consummated his intention, and that the knowledge of that fact was the cause of the original and continued estrangement and separation from his family? In other words, there being no objection to Jeanne being Valentine's mistress, that he must have abandoned his family only because he made her his wife, and upon this ground the defendant was declared legitimate by a divided court.

The latest case is that of *O' Gara agt. Eisenlohr* (38 *New York*, 296), which, in my judgment, puts some restraint upon the tendency which had been particularly apparent in England, that in every case where there is cohabitation and reputation a marriage must be presumed.

The facts were as follows: Patrick Downey was a poor man, living and working in the mines in Pennsylvania from 1833 to 1842. He was married to and lived with a woman named Rose McKone. In 1844, at Bath, New York, he married another woman, the defendant. His wife Rose was then living. The defendant never had heard of his former marriage. Rose was last heard of in 1852, and Downey died in 1856, living with the defendant from that time till his death as his wife. The court held that as the defendant had never heard of the existence of the first wife, that there was no motive for her to urge a remarriage; and as to Downey, he having been convicted, by direct and positive testimony, of criminality, it was to be expected that he would continue his unlawful marital relation with the defendant.

The court say that it is claimed we must presume that Rose Downey died before her husband, and that after her death the defendant and Downey were married, but that presumptions of this kind require to be made with caution; and no

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one can look through the adjudged cases on this subject without being convinced that the legitimate limits of presumption have been too frequently overlooked.

There are many cases in the books which cannot be considered as law, and which are condemned by the best commentators; and allusion is made to the fact that in cases of hardship presumptions are indulged in which are manifestly incredible, and that the presuming of absurdities in order to meet a particular case is ever fraught with mischief. The case of *Cayton agt. Waddel* is certainly an illustration of this fact. The language of Sir W. D. EVANS is also quoted with approbation where he says: "If we once admit the propriety of professing to believe as true what we are actually convinced is not so, nobody can say where the deviation will stop, and legal certainty will be sacrificed at the shrine of judicial discretion."

I have deemed it necessary to make this extended review of the cases in order that we might see what were the principles which have controlled the courts in dealing with cases of this description, and to correct some very erroneous impressions which are current as to the nature of our decision upon this subject.

It would appear that where a man and woman have cohabited as man and wife, have been reputed as such among their friends and acquaintances, and have been recognized as such by each other, a marriage may be presumed. But that it is not every cohabitation from which the presumption can arise but that it must be matrimonial, and if it were illicit in its commencement some facts must be shown that a change has taken place in its character.

In applying these principles to the present case what do we find? Captain Wright's intimacy with Eliza Campbell was undoubtedly illicit in its commencement. The first three children were born during the life of the first wife. The only change which seems to have taken place in their relations to each other, after the death of the first wife, is that Eliza

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Campbell, after that event, lived continuously, almost, in the house with Captain Wright. Their intercourse was clandestine; they did not occupy the same room; she was not known generally as Mrs. Wright, if at all. There were only four occasions in the course of sixteen years that she was ever introduced by him, or called Mrs. Wright or his wife. She was known in the household of Captain Wright as Mrs. Campbell. In the purchase of the farm in Dutchess county the plaintiff represented herself as Mrs. Campbell, the widow of John Campbell deceased, when she now swears that she never knew such a man. This representation was made, undoubtedly, to account for the children she had with her. In the Sabbath-school at Throgg's Neck, the children were known as Wright's; but this name applied to all the children of the plaintiff, both those born before the death of the first wife and those born afterward. Captain Wright, in his letters, speaks of the children of the plaintiff, and of the plaintiff herself, in the most affectionate terms, but those terms of affection applied to the earlier born children as well as to the last. He made no distinction.

Could it be possible that the plaintiff, if she knew that her children had the right to the name of their father, would have deliberately entered their births in the Bible, as she did, giving the name of Campbell to them? This was not a record for public inspection, but a private memorandum of her own. The circumstances attending the burial of Humphrey would be very strong standing alone, but when taken in connection with the other circumstances of the case I think they are robbed of much of their significance. It is true the plate upon the coffin was Wright, but the burial certificate was Campbell. The whole of the plaintiff's correspondence with Captain Wright is not such as a wife would write to a husband. I do not refer to individual detached expressions, because that is a very unfair way in which to criticise correspondence, but to the general character of the letters written by her to him. She certainly does not write like one entitled

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to share his house and home, entitled to claim, as a matter of right, a support for herself and children, but rather as a dependent--one who has no claim to the support which he gave her,—always addressing him as her dear friend. And it would seem that the children never called him father, but always spoke of him as the “captain.” The only instances where there was any evidence that Captain Wright admitted that the plaintiffs had the right to the name of Wright was at the time of the death of Humphrey, and the three or four times that he introduced Eliza Campbell as his wife, or Mrs. Wright; and are not these occasions just within the cases stated by the chancellor in the case of *Rose agt. Clark*, where a man frequently attempts to give his mistress a different character from what she in fact sustains toward him? In the same case it is said that the presumption of marriage only arises from matrimonial cohabitation, where the parties not only live together as husband and wife but hold themselves out to the world as holding that honorable relation to each other.

In every case reported in our state, except that of *Canjolle agt. Ferrie*, there has been an actual marriage proved, but which was void because of the existence of a prior wife, and also a continuance of cohabitation as man and wife, and a general acknowledgment of this relationship as existing between them for a number of years after the impediment was removed, and the reasoning of the court has been that, as the cohabitation was with a matrimonial intent, evidenced by the prior void marriage, if the cohabitation continued for a number of years after this disability had been removed, we must presume that the parties being aware of the necessity of a remarriage to make their cohabitation legal, that they must have made a new agreement.

In these cases, and also the case of *Canjolle agt. Ferrie*, the fact that there was a desire that there should be a legal marriage being indisputably shown, seems to be at the foundation of the presumption that there was a marriage.

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Indeed, in the case of *O'Gara* agt. *Eisenlohr*, where the wife of a void marriage did not know of the illegality of her marriage until after the death of her supposed husband, the court say that although they lived together after the disability had been removed, no presumption of marriage could arise because the innocent party had no reason to suppose its necessity.

In the case now under consideration, I have been unable to detect the slightest evidence of matrimonial cohabitation; no evidence that Captain Wright ever desired to make Eliza Campbell his wife.

The connection was meretricious in its commencement, and no evidence has been offered of any change in its character, except that, subsequent to the death of Mrs. Wright, Eliza Campbell occupied the same house with Captain Wright, not as his wife, but his housekeeper.

There is no evidence of common reputation, indeed the reputation is all to the contrary.

Eliza Campbell was never known as Mrs. Wright; and, during a period of sixteen years, only four instances have been shown, or attempted to be shown, that he called her his wife or Mrs. Wright.

The connection between Captain Wright and Eliza Campbell was looked upon by his children as disreputable.

As to the treatment of the children, no distinction was made by Captain Wright between those who are confessedly illegitimate and plaintiffs, or his own who lived with him.

Much stress is laid upon the fact that the plaintiff occupied a seat at the head of the table, &c. She would naturally do so if she had charge of the household affairs. She was the only woman in the house who could perform at the table those offices which generally devolve upon the wife, but which, in her absence, are of necessity performed by the housekeeper.

I am aware that the rule is, and rightfully so, that everything is to be presumed in favor of legitimacy; but as long

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as the law requires marriage in order to make children legitimate, I do not think courts have the right to perform the ceremony or make the contract of marriage for the parties, where the probabilities all tend to show that the connection has been meretricious.

My sympathies are with the plaintiffs in this case, and if there was the shadow of a doubt in my mind in reference to the fact of this marriage, I would gladly give them the benefit, but I cannot see any difference between the births of the first three children, who are confessedly illegitimate, and the plaintiffs.

The result of a careful examination of the evidence in this case only strengthens the impression which that evidence produced upon my mind at the trial, which is that Captain Wright never did marry Eliza Campbell and never intended to do so.

With this conviction firmly established in my mind, I cannot do otherwise than render judgment for the defendants.

O'Brien agt. Merchants' Insurance Company.

N. Y. SUPERIOR COURT.

JAMES O'BRIEN, sheriff, &c., agt. THE MERCHANTS' INSURANCE COMPANY.

SAME agt. THE COMMERCIAL FIRE INSURANCE COMPANY.

SAME agt. THE WILLIAMSBURGH CITY FIRE INSURANCE COMPANY

SAME agt. THE MECHANICS AND TRADERS' INSURANCE COMPANY.

Discontinuance of attachment suits by sheriff.

Section 232 of the Code limits the right of the sheriff in discontinuing attachment suits brought by him, except "at such times and upon such terms as the court or judge may direct."

The court will not allow any discontinuance of such actions on the part of the sheriff that will inure to the injury of the parties interested in the debts attached.

Special Term, October 25, 1874.

THESE four actions being brought in this court by the sheriff, to collect four policies of insurance of \$2,500 each, by virtue of seven warrants of attachment, amounting to about \$7,000, against one E. S. Candler, Jr., the party insured, the defendants, on the eve of trial, offered to pay to the sheriff the amount of the attachments and taxable costs to date, and demanded that on such payment the actions should be discontinued by the sheriff.

Motion to discontinue on said terms, under section 232 of the Code, was made by *Brown, Hall & Vanderpoel*, attorneys of record for the sheriff, and opposed by *Wm. W. Badger*, as attorney in charge of the actions on behalf of the

O'Brien agt. Merchants' Insurance Company.

attaching creditors; he holding also a power of attorney from said E. S. Candler, Jr., the party insured, and claiming to protect his interest and margin in the surplus in the policies, over and above the amount called for by the attachments.

The defendants, by *George W. Parsons*, as counsel, united in the motion of the sheriff to discontinue.

CURTIS, J. — It appears from the papers that the granting leave to the sheriff to discontinue these suits, commenced by him on behalf of sundry attaching creditors of one Candler, to collect claims in Candler's favor on policies of insurance, would prejudice Candler's interest in any surplus that might be due to him after the claims and costs of the attaching creditors were paid in full.

The effect of such a discontinuance, it is claimed, and seemingly with reason, would be to defeat Candler's recovery, from the insurers, of such surplus, by reason of the limitations as to the time in which he can sue.

The provisions of the Code (§ 232) limiting the right of the sheriff to discontinue this class of actions, except "at such times and upon such terms as the court or judge may direct," is evidently designed for the protection of the parties interested in the debts attached; and that there shall be no discontinuance, on the part of the sheriff, of actions that will inure to the injury of such parties.

I think it is the duty of the sheriff to prosecute these suits to judgment, and when, as provided in subdivision 4 of section 237 of the Code "the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof."

The motion is denied, without costs.

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SUPREME COURT.

MATTHEW GRIFFIN agt. HIRAM TODD.

Motion for judgment on account of frivolous answer.

To justify a judgment for the plaintiff on account of the frivolousness of the answer, the point presented should be so clear as to require no argument.

This is not the case where the plaintiff complains for goods sold and delivered on a credit which is alleged to have been obtained by fraud, and the defendant not only denies the cause of action, but in one of his defenses, specifically puts in issue the allegation of fraud.

The question whether the plaintiff can or cannot recover for goods sold without proving the fraud is a disputable and debatable one.

Ulster County Special Term, October, 1874

MOTION for judgment on account of the frivolousness of the answer.

M. Griffin, attorney, in person, for the motion.

S. P. Ives, opposed.

WESTBROOK, *J.*—The complaint is for goods sold and delivered by plaintiff to defendant, alleging the credit was obtained by fraud.

The answer, first, denies the complaint as "the same is therein alleged;" second, it denies that defendant, through fraudulent representations, made any purchase of goods, as alleged by the plaintiff in his complaint; third, it alleges that prior to the commencement of this action plaintiff was and still is indebted to this defendant in the sum of

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\$65.14, being for money paid the plaintiff at his request, and for labor done at the request of the plaintiff, all within the last six years past; therefore, demand judgment for costs. The pleadings were under oath; and the defendant also presents an affidavit of merits on this motion.

The plaintiff seeks to recover for goods sold to defendant, alleging that the sale was procured by fraud. The fraud thus becomes an important and material part of the case (*Ross agt. Mather*, 51 *N. Y. R.*, 108). The answer not only denies the cause of action set out in the complaint, as the same is therein alleged, but it also, specifically, by the statement of a second defense, puts in issue the fraud.

To justify a judgment for the plaintiff on account of the frivolousness of the answer, the point presented should be so clear as to require no argument.

In my opinion, the question is not so clear as to justify an order for judgment within the case of *Ross agt. Mather*, cited above. I think the fraud becomes an essential part of the cause of action; and hence the answer is technically right. I do not, however, absolutely, so decide, but simply decide that the case, just referred to, goes so far in the establishment of a principle that, at least, the question whether the plaintiff can or cannot recover for goods sold, without proving the fraud, is a disputable and debatable one, and hence, within the established rule to which reference has been made, that, to justify judgment for plaintiff, the point must be apparent without argument. This motion must be denied.

The plaintiff has also another difficulty. If the action can be turned into a simple one of *ex contractu* for goods sold, then the part of the answer which interposes a set-off would be good, and prevent the recovery of a judgment upon this motion.

The motion is denied, with ten dollars costs

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NEW YORK COMMON PLEAS.

HELEN L. GRINNELL agt. FREDERICK S. KIRTLAND *et al.**Right of way—easement—dedication.*

Where the plaintiff has had full and undisturbed possession and enjoyment of an easement or right of way, accepted by the original grantee, and used by him and those claiming under him for over twenty years, over a strip of land laid out on a city map as a proposed street, and upon which his land is bounded to the center, cannot sustain an action against an adjoining owner opposite, whose land is also bounded to the center of said proposed street, for a judgment requiring the defendant to remove all obstructions from one-half of said proposed street, and that the same be considered as dedicated to the public and to be used as a public street.

Especially where no acceptance by the public authorities has been received, and no request made for the opening of said street.

*August, 1874.**Before LARREMORE, J.**Augustus F. Smith, for plaintiff.**Geo. C. Genet, for defendant.*

LARREMORE, J.—In the year 1861, Mrs. Lucy Audubon was seized and possessed of certain lands in the city of New York, known as “Audubon Park,” lying between the streets and avenues designated on the map or plan of said city previously made, as One Hundred and Fifty-fifth and One Hundred and Fifty-seventh streets, and Eleventh and Twelfth avenues. On said map a strip of land sixty feet in width was laid as One Hundred and Fifty-sixth street. In the

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year last mentioned Mrs. Audubon sold the land fronting on One Hundred and Fifty-sixth street to different parties, making the center of One Hundred and Fifty-sixth street the dividing line, and the northerly and southerly boundary of the respective parcels thus conveyed. At the time of such sale there was a road or lane running through said lands along that portion thereof which is shown on said map as the northerly part of One Hundred and Fifty-sixth street, and is now used substantially as the same was originally laid out, for the consideration of the owners of property on the line thereof. In the deeds given by Mrs. Audubon, as aforesaid, each of the grantees therein named covenant and agree that their grantor, her heirs and assigns, shall be and are entitled to a sufficient right of way through and along One Hundred and Fifty-sixth street, thereby conveyed to said grantee for all lawful purposes, to use the same as a public road. The parties to this action, by sundry mesne conveyances, have become the owners of the lands in question — the plaintiff of the northerly and the defendant of the southerly portion thereof. No map of said premises was ever made by Mrs. Audubon. No proceedings have ever been taken by the public authorities to open said street, and on an official map recently made said strip of land is not laid out as a street, and does not appear thereon. This fact summarily disposes of the question as to the right to have and use said strip of land as a street. The plaintiff claims, however, that by the boundaries contained in said deeds by Mrs. Audubon there was a dedication of said land called One Hundred and Fifty-sixth street, as for a street, and that the same is subject to an easement and right of way for the benefit of the owners of lands fronting thereon, to the full extent of the width thereof, and that it should be kept open for that purpose. To this end she seeks the judgment of the court, and that defendants may remove all fences and obstructions from the southerly half of said street, and refrain thereafter from obstructing the same.

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The question of dedication is one of intent, to be established by acts unequivocal and decisive in their character, and unmistakable in their purpose (*Hunter agt. Trustees, Sandy Hill, 6 Hill, 407*; *Carpenter agt. Guynn, 35 Barb., 395*). This principle is general in its application, whether construed as in favor of the public, or as between owners and purchasers. Did Mrs. Audubon intend that a street of the width of sixty feet should be opened at once, and in any event, for the benefit of her immediate grantees, whether it should be accepted or not, by the public authorities? Did said grantees so understand it when, in the very instrument in which such dedication is alleged to have been made, is contained a reservation on her part, and a covenant on theirs, as to a right of way through and along the street in question? No demand appears to have been made on their part, or their successors in interest, for the opening and use of said street; on the contrary, the road reserved in said deeds has been used and accepted by them as sufficient for all purposes of ingress and egress to and from the lands in question for more than twenty years. It is evident, then, that the alleged dedication was qualified and not absolute. That it was intended to take effect only upon an acceptance by the public authorities. But it is urged with great force that the question in dispute has already been adjudicated; that when an owner of city property sells it in lots or parcels bounded on a street, whether opened or designed, and by reference to a map made and filed, such act alone constitutes a dedication of the land included in the proposed street. But in the cases relied upon to sustain this position, viz., *Livingston agt. The Mayor, &c. (8 Wend., 85)*; *Wyman agt. The Same (11 Wend., 487)*; *In re Thirty-fourth street (1 Hill, 191)*; *In re Seventeenth street (1 Wend., 262)*, the question of acceptance was not in dispute. These were cases arising upon assessments made for the opening of the streets by the public authorities, and the fact of acceptance was the basis of the whole proceeding. The general term of the supreme court

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in *Badeau* agt. *Mead* (14 *Barb.*, 328), after a review of the earlier decision, holds "that a grant, whether inferential or direct, or whether to the public or to a private individual, is inefficacious until accepted by the grantee; that the doctrine of a dedication has been carried far enough, and ought not to be extended." And the court of appeals in *Fonda* agt. *Borst* (2 *Keyes*, 48), held that a purchaser of a lot designated and laid out on a map as bounded by a street, was not entitled to have said street opened until it had been accepted by the public. This decision makes no distinction between urban and rural property. The land in dispute not having been accepted by the public authorities there was no dedication of it as a street. Nor has there been any acceptance or user of it as a road, to the extent mentioned in the alleged dedication. The plaintiff having the full and undisturbed possession and enjoyment of an easement or right of way, accepted by the original grantee, and used by him and those claiming under him for over twenty years, cannot sustain this action, and judgment must be rendered for the defendants therein.

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COURT OF APPEALS.

JOHN E. BLISS, appellant, agt. CHARLES K. LAWRENCE,
respondent.

JOHN E. BLISS, appellant, agt. GEORGE H. GARDNER,
respondent.

Assignment of salaries of public officers before falling due.

It is against public policy and unlawful to allow the assignment or transfer of the salary of a public officer before it becomes due and payable. Salaries are by law payable after work is performed and not before; and while this remains the law, it must be presumed to be a wise regulation and necessary in the view of the law makers to the efficiency of the public service.

The substance of this whole doctrine is, the necessity of maintaining the efficiency of the public service by seeing to it that public salaries really go to those who perform the public service. To this extent the public policy of every country must go to form the end in view.

October, 1874.

H. Ellis, for appellant.

L. I. Lansing, for respondent.

JOHNSON, J.—The controlling question in these cases is that of the lawfulness of an assignment by way of an anticipation of the salary to become due to a public officer. The particular cases presented are of assignments of a month's salary in advance. But if these can be sustained in law, then such assignments may cover the whole period of possible service. In the particular cases before us, the claims to a month's salary seem to have been sold at a discount of about

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ten per cent. While this presents no question of usury (since it was a sale and not a loan for which the parties were dealing), it does present a quite glaring instance and sample of the consequences likely to follow the establishment of the validity of such transfers; and this illustrates one, at least, of the grounds on which the alleged rule of public policy rests—by which such transfers are forbidden. The public service is protected by protecting those engaged in performing public duties; and this—not upon the ground of their private interest, but upon that of the necessity of securing the efficiency of the public service—by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work at such periods as the law has appointed for their payment. It is argued that a public officer may better submit to a loss in order to get his pay into his hands in advance than deal on credit for his necessary expenses. This may be true in fact, in individual instances, and yet may, in general, not be in accordance with the fact. Salaries are by law payable after work is performed and not before; and while this remains the law it must be presumed to be a wise regulation, and necessary in the view of the law makers to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. It is true that, in respect to officers removable at will, this evil could, in some measure, be limited by their removal when they were found assigning their salaries, but this is only a partial remedy, for there would still be no means of preventing the continual recurrence of the same difficulty. If such assignments are allowed, then the assignee, by notice to the government, would, on ordinary principles, be entitled to receive pay directly, and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce

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results disastrous to the efficiency of the public service. Some misapprehension as to the doctrine involved seems to have arisen from the fact that the modern adjudged cases have often related to the pay of half-pay army officers, which, in part, is given as a compensation for past services, and in part with a view to future services. Upon a review of the English cases, it will appear that the proposition is, upon authority unquestionable, that the salary for continuing services could not be assigned, while a pension or compensation for past services might be assigned. The doubt, and the only doubt, in the case of half-pay officers, was to which class they were to be taken to belong. It was decided that, inasmuch as their pay was in part in view of future service, it was unassignable. Similar questions have arisen in respect to persons not strictly public officers; but the principle before stated has, in the courts of England, been adhered to firmly (*Flarty* agt. *Odlam*, 3 *T. R.*, 681; *Stone* agt. *Lidderdale*, 2 *Aust.*, 233; *Davis* agt. *Marlboro*, 1 *Swanst.*, 79; *Lidderdale* agt. *Montrose*, 4 *T. R.*, 248; *Barwick* agt. *Read*, 1 *H. B. C.*, 627; *Arbuckle* agt. *Corotan*, 3 *Bos. & P.*, 328; *Wells* agt. *Foster*, 8 *M. & W.*, 149; *Story Eq. Jur.*, sec. 1040, *d. & c.*; *Parsons on Cont.*, 194). These cases sustain the proposition above set forth, and show the settled state of the English law upon the subject. Some other cases are so pertinent to the general discussion as to deserve to be stated more at length, especially as they are not so accessible as those before referred to. Among them the judgment of lord BROUGHAM, in the house of lords, in *Hunter* agt. *Gardner* (§ *Wilson & Shaw*, 618), decided in 1831, gives an admirable summary of the state of the English law upon the subject. The case was a Scotch appeal, in which the Scotch court had approved, under the law of that country, a partial transfer of the salary of a public officer. The particular judgment was affirmed, without deciding what the law of Scotland was upon the subject. In his judgment, lord BROUGHAM said: "The court seems not to have scruti-

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nized very nicely whether, from the nature of the subject-matter, namely, the half-pay or the full-pay of an officer, or a minister's stipend, or, in the present case, the salary of an officer employed under government, and in the execution of an important trust—an assignment can validly operate upon and affect those particular rights; but they have, nevertheless, assumed to deal with them, and have directed that a certain proportion of them shall be assigned on the condition of granting the benefit of the *cessio bonorum*." These cases, undoubtedly, could not have occurred in this country.

I may refer to the well known case of *Flarty agt. Odlam* (3 T. R., 681), which, from its importance, was the subject of much discussion, it being the first case in which it was held that the half-pay of an officer was not the subject of assignment; and it was followed in *Lidderdale agt. The Duke of Montrose* (in T. R.), where the doctrine laid down was made the subject of further discussion, and the court adhered to its former view—that the half-pay was free from attachment; so that neither is a man bound to put it into the schedule of his assets nor does the general assignment to the provisional assignee, under a commission of bankruptcy, pass it out of the bankrupt; it is unassignable, and incapable of being affected by any of those modes of proceeding. The same doctrine was laid down with respect to the profits of a living, in that of *Arbuckle agt. Cowlan*, the judgment in which has been very much considered in Westminster Hall; and, like most of the judgments of that most able and learned lawyer, lord ALVANLEY, has given great satisfaction to the courts and the profession. In the report of that case your lordships will find laid down the general principle—though, perhaps, not worked out in these words—that all such profits as a man receives in respect to the performance of public duty are, from their very nature, exempt from attachment and incapable of assignment, inasmuch as it would be inconsistent with the nature of those profits that he who had not been trusted or he who had not been employed to do the duty should,

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nevertheless, receive the emoluments and reward. Lord ALVANLEY quotes *Flarty* agt. *Odlam* and *Lidderdale* agt. *Montrose*; and, in illustrating the principle on which a person's emoluments are not assignable, he does not confine his observation to the particular case of half-pay officers, or the case of this person, or the emoluments, but he makes the observation in all its generality as applicable to every case of a public officer.

The first case (in 1 *H. B. C.*, 629) decided by the court of common pleas, is the case of *Barwick* agt. *Read*, which clearly recognized the principle. * * * In this case as well as the other case of *Arbuckle* agt. *Cowlan*, it was perfectly clearly held by the court that in all such cases one man could not claim to receive, by assignment or attachment, emoluments which belonged to another deemed to be capable of performing the duties appended to those emoluments, but which duties could not be performed by the assignee; and there was an old case, referred to in *Barwick* agt. *Read*, and a curious case in *Dyer*, in which, as long ago as the reign of Elizabeth, the question appears to have been disposed of by a decision now undisputed, and now referred to in Westminster Hall. * * * All these cases lay down this principle, which is perfectly undeniable, that neither assignment nor attachment is applicable to such a case.

Other cases to the same effect, of later date, are likewise noteworthy. In *Hill* agt. *Paul* (8 *Black & Fevin*, 307), decided in 1842, lord chancellor LYNDHURST, speaking of legality of assigning the future emoluments of an office in Scotland, says that such an assignment would be illegal in England. There can be no doubt that *Palmer* agt. *Baker* (12 *Brad. & Benj.*, 693), is directly applicable to this case; and in *Davis* agt. *Marlborough* (1 *Swanst.*, 79), there is this observation of lord ELDON, already cited, which seems to me quite in point, and which lays down the true rule and the distinction to be observed in these cases, and to which, for that reason, I refer, as showing what is the law of England on this subject. What lord

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ELDON said in the case referred to was; "A pension for past services may be aliened; but a pension for supporting the grantor in performance of future duties is inalienable." And in *Flarty* agt. *Odlam* (4 T. R., 248), the court says: "It might as well be contended that salaries of judges, which are granted to support the dignity of the state and administration of justice, may be assigned." In *Arbuthnot* agt. *Norton* (5 *Moore's Priv. C. Cases*, 23 c.), decided in 1846, the question was whether an Indian judge could assign a contingent sum to which, on his death within six months after his arrival in India, his representative would be entitled by law, and it was held that such an assignment was not against public policy, and would in equity transfer the right to the funds. In the course of the judgment given by Dr. LUSHINGTON, he says: "We do not in the slightest degree controvert any of the doctrines whereupon decisions have been founded against the assignment of salaries by persons filling public offices; on the contrary, we acknowledge the soundness of the principles which govern those cases: but we think that this case does not fall within any of these principles; and we think so, because this is not a sum of money which, at any time during the life of Sir John Norton, could possibly have been appropriated to his use, or for his benefit, for the purpose of sustaining with decorum and propriety the high rank in life in which he was placed in India. We do not see that any of the evils which are generally supposed to result from the assignment of salaries could, in the slightest degree, have resulted from the assignment of this sum, inasmuch as during his lifetime his personal means would, in no respect whatever, have been diminished, but remain exactly in the same state as they were. In *Liverpool* agt. *Wright* (28 *Law Journal* [*N. S. Chancery*], 871), in which the question related to the alienability of the fees of the office of a clerk of the peace, WOOD, V. C., after disposing of another question, says: "Then there is a second ground of public policy, for which the case of *Palmer* agt. *Vaughan* (3 *Swanst.*, 173), is the

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leading authority, which is this: That, independently of any corrupt bargain with the appointor, nobody can deal with the fees of a person who holds an office of this description, because the law presumes, with reference to an office of trust, that he requires the payment which the law assigns to him for the purpose of upholding the dignity, and performing properly the duties of that office; and therefore it will not allow him to part with any portion of these fees, either to the appointors or to anybody else. He is not allowed to charge or incumber them. That was the case of *Parsons agt. Thompson* (1 *H. B. C.*, 322). Any attempt to assign any portion of the fees of his office is illegal on the ground of public policy, and held, therefore, to be void."

In respect to American authority, we have been referred to *Brackett agt. Blake* (7 *Metc.*, 335), and *Mulhall agt. Quinn* (1 *Gray*, 105), and *Newcombe agt. Doane* (2 *Allen*, 541), as conflicting with the views we have expressed.

An examination of these cases shows that the point of public policy was not considered by the court in either of them, but that the question was regarded as entirely relating to the sufficiency of the interest of the assignor in the future salary, to distinguish the cases from those of attempted assignments of mere expectations—such as those of an expectant heir.

The court held that, in the cases cited, the expectation of future salary being founded on existing engagements, was capable of assignment, and that the existing interest sufficed to support the transfer of the future expectation. The only other case to which we have been referred is to a decision of the supreme court of Wisconsin in *State Bank agt. Hastings* (15 *Wis.*, 78), the question being as to the assignability of a judge's salary, the court says: "We were referred to some English cases, which hold the assignment of the pay of officers in the public service, judges' salaries, pensions, etc., void, as being against public policy; but it was not contended that the doctrine of those cases was applicable to the condition of society or the principles of law or of public policy in this

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country. For certainly we can see no possible objection to permitting a judge to assign his salary before it becomes due, if he can find any person willing to take the risk of his living and being entitled to it when it becomes payable." We do not understand that the English decisions really rest on any grounds peculiar to that country, although sometimes expressed in terms which we might not select to express our views of the true foundation of the doctrine in question. The substance of it all is the necessity of maintaining the efficiency of the public service by seeing to it that public salaries really go to those who perform the public service. To this extent we think the public policy of every country must go to form the end in view.

The judgment must be affirmed.

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N. Y. SUPERIOR COURT.

JOHN O'MAHONEY agt. AUGUST BELMONT and another.

Motion to set aside precept for contempt, for irregularity.

Where on the settlement of the accounts of a receiver, an order of the court is issued directing the amount found to be due from him to be paid over on demand to the proper party, together with a specified sum in addition as referee's fees; and where a personal demand has been made of the receiver, under the order of the court, for payment of these sums, which has been refused, it is no objection to the validity of the order of the court on issuing the precept for commitment, or to the process, that it was issued for a less amount (by deducting the referee's fees) than was demanded.

Special Term, May, 1874.

MOTION, made by a receiver in the action, to set aside a precept issued against him for non-payment on demand of the moneys directed to be paid by him by an order of the court of March 6, 1873, upon the settlement of his account as receiver. (2 R. S., vol. 2, 535, § 4.) The order directed the payment, by the receiver, of the sum of \$24,627.31, together with the sum of \$520, referee's fees, on the settlement of the receiver's accounts, paid by one of the defendants.

*James Henderson, attorney, and**Samuel Jones, of counsel, for T. J. Barr.*

The statute under which the precept was issued is in the nature of a *penal* statute, and should be construed strictly. (2 R. S., vol. 2, 535, § 4.)

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The several demands upon Mr. Barr included the \$520, referee's fees, which the court, in granting the order for the precept, struck out; thus holding that a precept should not issue under section 4 of the statute for said fees, for the reason that they were in the nature of costs against said Barr. This, under the law of 1847, chapter 390, was undoubtedly a correct ruling. The demands, however, not following the language of the order of March 6, 1873, but being for a sum in gross, and for a greater amount than that for which defendant Lucke was entitled to obtain a precept under said section, is insufficient.

The demand provided for by said section 4, is analogous to that required in summary proceedings to dispossess for non-payment of rent; and as to requisites of such demand see *Wolcott agt. Schenck* (16 How., 451); *Van Rensselaer agt. Jewett* (2 Coms., 147).

The mere service of the order of March 6, 1873, directing payment of money, is not a sufficient demand (*Gray agt. Crook*, 24 How. Pr. R., 432).

In any event, the demand should have been made *personally*, by one of the parties to whom payment was directed to be made; and this not having been done, the proceedings are irregular (*Pantur agt. Zebley*, 19 How. Pr. R., 394).

It is submitted, that the motion to vacate the precept and order allowing the same should be granted.

Barlow, Larocque & McFarland, for defendants.

First. There is no analogy between the provisions of the statute under which the commitment in question was issued and the law regulating the rights of landlords. No better illustration of this could be required than that furnished by the case of *Van Rensselaer agt. Jewett*, cited by the counsel for Mr. Barr. In that case the court held that "where the remedy by re-entry for the non-payment of rent is reserved by the lease, and the landlord pursues it under the provisions of

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the common law, it is indispensable to his right to re-enter that he should, either in person or by his agent or attorney, duly authorized, previously, on the *very day* upon which the rent becomes due and payable, at a convenient time before sunset, in which the money may be counted before night, make an actual demand of the exact amount of the rent due, at the particular place at which the rent may be made payable by the terms of the lease; or if there be no place stipulated in the lease, then, at the most notorious place upon the land demised, which, if there be a dwelling-house, is the front door thereof."

A court of equity would find its hands rather too closely tied to enable it to be of much service, if obedience to its orders could only be enforced after such a close and technical method of procedure toward the person whose obedience was sought to be compelled.

The case of *Wolcott* agt. *Schenck*, cited by the counsel for Mr. Barr, was disposed of upon the point that the only demand of rent upon which the proceeding was based was, as appeared from the landlord's affidavit, a demand, not made of the lessee, personally, nor upon the demised premises, but of an alleged agent of the lessee—the affidavit disclosing neither the name of the agent nor the character of his agency.

The case of *Gray* agt. *Cook* (24 Barb.), was disposed of by Mr. Chief Justice Bosworth on the ground that the decision there in question, being in its nature a final judgment which could be enforced by execution, the fourth section of the article relating to proceedings as for contempt in aid of civil remedies had no application.

In the present case, not only was the original order served, but also a copy of the order of the general term affirming it; and demands were made for compliance, both before the appeal and after the affirmance of the order upon appeal.

Mr. Barr having appealed from the order, is presumed to have been fully advised as to all the terms thereof. The

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demands were made in precise conformity with the order. All that it was necessary to do to set the machinery in motion to punish his disobedience of the order, was to give him notice of its contents and to request his compliance; this being done, if he omitted to obey it, he did so at his own peril. He could at any time have tendered or offered compliance with so much or such parts thereof as he thought fit.

Second. The suggestion that one of the parties named in the order should have in person called upon Mr. Barr and made the demand, certainly needs no reply. The maxim, "*fui facit per alium facit per se*," governs this case. The evidence produced before the court shows that the person making the demand was fully authorized, and that the proper evidence of his authority was presented to, and left with Mr. Barr at the time of the demand.

The case of *Tanton agt. Zebley*, cited by Mr. Barr's counsel, was a case where an order had been made for the delivery of property to a receiver. An attachment for contempt was refused, because the evidence showed that the only demand made upon the defendant was one by a referee, which called upon the defendant to deliver the property to the plaintiff's attorney or to the referee. The court held that the defendant was under no obligation under the order in that case to deliver the property to anybody but the receiver; and there was no evidence to show any authority on the part of the referee or the plaintiff's attorney to represent the receiver in that matter.

Third. It is not true that there was any decision of the court as to the propriety of Mr. Barr's commitment for non-payment of the referee's fees, embraced in the original order; that amount was omitted from the order for commitment, as the court will recollect, voluntarily, by the attorneys for the defendant Lucke, to avoid any possible question; although it was claimed and is insisted that said amount cannot properly be considered as in any sense interlocutory costs, and that

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Mr. Barr might have been committed with perfect propriety in consequence of his refusal to pay that amount.

Fourth. An attachment to appear and answer, is not the proper remedy for a contempt, which consists in not paying a sum of money directed to be paid. In such case the precept issues to commit directly (2 *R. S.*, 535, §§ 4, 5; 2 *Barb. Ch.*, 271; 1 *Hoffm.*, 429).

The Code does not affect the practice in this respect (*People ex rel. Pease agt. King*, 9 *How. Pr.*, 97; *People agt. Morris*, 1 *Hill*, a. p. 169).

A party committed for contempt will not be discharged for a mere irregularity in the proceedings, in the course of which his committal was made, if the officer had jurisdiction (*Meyers agt. Janes*, 3 *Abb. Pr.*, 301).

VAN VORST, *J.* — Two demands have been made upon the late receiver for the payment of the moneys ordered to be paid by the order of this court, made on the 6th day of March, 1873. The demands were made on him personally.

The first demand was made on the 14th day of March, 1873, and the latter on the 16th day of April, 1874, after the order had been affirmed by the general term, on appeal. A copy of the order was served on him, showing the separate amounts ordered to be paid.

Both demands were refused. On the 14th March, 1873, the amount demanded was the sum of \$25,882.30, being the amounts ordered to be paid, with interest to the date of that demand, stated in one sum. On the 16th April, 1874, the sum demanded was \$27,808.76, being the amount of the sums directed to be paid, with the interest added to that date.

Upon the return of the order to show cause why the order directing the issuing of a precept, and the precept itself, should not be set aside, it was objected on the part of the late receiver, that the demand was made for a sum greater than that ordered to be collected by the precept. It is not shown that more was demanded of the late receiver than was ordered

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to be paid by him by the order of the 6th March, 1873, and the amount stated in the papers upon which the order for the issuing of the precept was made, and which appears was demanded, must be deemed to be the correct amount so ordered to be paid, with interest added.

That the order directed the issuing of a precept for a less amount than was demanded, is no reason why it should be set aside if, in fact, no more was demanded than the late receiver was called upon to pay by the direction of the court.

The amount for which the precept was ordered was the sum of \$24,627.31, with interest from the 7th day of October, 1872; which was one of the sums directed to be paid by the order of 6th March, 1873, and was included in the demand, the interest being added. The sum of \$520, the referee's fees, directed to be paid by the late receiver by the same order, and which, with interest, had been included, and that properly, in both demands, as the defendant was entitled to demand its payment, was, however, omitted from the order directing the precept, and from the precept itself. This cannot affect the validity of the order or the precept, as both amounts were money ordered to be paid by the court.

It is unnecessary to decide whether a precept could have issued to enforce the payment of the sum of \$520, as such sum is not included in the order directing its issuance. But that its payment was properly demandable, and that too at the time the other amount was demanded, can scarcely be questioned.

But I am inclined to think that there is no difference in the character of the sums which make up the amount demanded, so far as the enforcement of their payment is concerned, and that the separate sum of \$520 ordered to be paid is not strictly within the terms "*costs*," mentioned in the act of November 22, 1847 (*Laws of 1847, chap. 390, §§ 2 and 3; Newton agt. Sweet, 4 How. Pr. R., 134, opinion of HARRIS, J.; Livingston agt. Fitzgerald, 2 Barb., 396*). In no sense

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is the amount "interlocutory costs." The amount is ordered to be paid in a special proceeding, after judgment; although entitled in the action, to settle and enforce the payment of the moneys in the hands of the late receiver, such moneys having been received by him as an officer of the court, and under its order.

This sum, it appears, had been paid by the defendant Lucke, or his attorneys, for the fees of the referee, on the accounting of the receiver, of the moneys in his hands. The court, in its order, directed that the late receiver should forthwith pay this sum, together with the principal sum above mentioned, to the defendant or his attorneys, for moneys so paid by them, on Mr. Barr's accounting.

No costs, as such, were awarded by the order of the 6th March, 1873.

The motion should be denied.

NOTE—The receiver after the precept was issued and served, was brought up before one of the justices of the supreme court upon writ of *habeas corpus* to inquire into the cause of his detention, but after a hearing the writ of *habeas corpus* was discharged, and the party remanded.

As to proceedings for contempt in not paying money ordered to be paid, see "*Crary New York Practice*," "*Special Proceedings*," vol. 1, 171.

Dean agt. *Ætna* Life Insurance Company.

SUPREME COURT.

RUTH E. DEAN, respondent, agt. THE *ÆTNA* LIFE INSURANCE
COMPANY, appellant.

Incompetent proof of extension of time of payment of premium on policy of insurance.

In an action to recover on a life policy of insurance, where the declarations made by the general agent of the defendant some six weeks previous, to prove that an agreement was then made between the assured and the general agent to extend to a certain future day the payment of the premium which had become due, on the policy, and by which agreement thus proved the defendant (the principal) was bound:

Held, that such declarations of the general agent were not competent evidence of the existence of the agreement for the extension of the time of payment of the premium. But after this evidence was all in, without objection, the defendant moved for a nonsuit on the ground that it was not proved that the condition of the policy, as to payment, was waived and the time of payment extended by the defendant or any person authorized to do so upon its behalf. The motion was denied and the defendant excepted.

Held, that if this objection had been broad enough to present the question whether the agent's declarations were competent evidence to show an extension of the time for the payment of the premium against the defendant, it would have been in time although the proof of them was received without objection.

Neither this motion nor the ground specified in its support, nor any other objection taken during the trial, presented that question. And as it was not raised at any time during the trial, it was necessarily waived when the case was submitted to the jury. The defendant had the right to have the case tried, if it so elected, on incompetent evidence; and the omission at any time to object is conclusive evidence of such waiver.

General Term, First Department, May, 1874.

Dean agt. *Aetna Life Insurance Company.*

APPEAL from judgment recovered on a verdict rendered at the circuit, and from order denying motion made upon the minutes for a new trial.

T. G. Strong, for appellant.

Joseph H. Choate, for respondent.

DANIELS, *J.*—By the express terms of both the policies in suit, the premiums upon them were made payable on or before the twentieth day of September in every year, during their continuance. And each contained the statement that it was understood and agreed that in case the premium should not be paid on or before the days mentioned for the payment thereof, the policy should cease and determine. The premiums which became due and payable on the 20th day of September, 1869, were not paid on or before that day, and the consequence resulting from that circumstance was, that the policies ceased and determined unless the time for the payment was extended by some agreement or arrangement binding on the company. That such an agreement had been made was a fact to be satisfactorily established by the plaintiff before her right to recover upon the policies could be maintained, and that she endeavored to prove.

The evidence given in support of that fact consisted of the declarations and statements of the defendant's general agent, in charge of its business at the city of New York. These statements were made on the 2d of November, 1869, and also a few days after the decease of the person whose life was insured by the policies, who died on the nineteenth of November of that year. They tended to show that an agreement was made between him and the defendant's general agent, on the twentieth of September preceding, by which the payment of the premiums for that year was so far extended that no part of them became due until the 5th of November, 1869; and it was shown that payment of such part was tendered

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to the agent, and refused by him, after the statements were made and before that day. At the time when the statements were made by the agent, admitting that he had made an agreement on the 20th of September, 1869, extending the time for the payment of the premiums for that year, he also delivered to the person he had the interview with written memoranda, indicating the amounts required to be paid according to the terms of that agreement; but they did not, of themselves, constitute such agreement, and were not delivered by way of renewing or entering into it. The witness who received them stated that the agent gave him the memoranda "as indicating the arrangement which he had previously stated" to him; and, as such, they were no more than the oral declarations of the agent reduced to writing.

Two other memoranda, signed by the defendant's agent, were found among the papers of the person whose life was insured, after his death, and were received in evidence on the trial; but they were evidently made before the 20th of September, 1869, because they call attention to the fact that the premiums on the policies would become due on that day, and request payment of the amounts. That is succeeded by certain figures unexplained upon the papers, which, with the explanation afforded by the agent's declarations, may possibly tend to indicate the existence of the agreement relied upon to sustain the recovery. But if they are capable of being used in that manner, it could not be done without the declarations themselves; so that if they were incompetent evidence for use in the case, nothing was proved from which an agreement for the extension of the time for the payment of the premiums could be inferred. Substantially, that depended upon the declarations of the agent for proof of its existence. Without them, there was nothing from which the extension of the time for the payment of the premiums could properly be found as a fact.

In this state of the proof, and after the evidence was all taken, the defendant moved for a nonsuit, specifying, among

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other reasons, in support of its motion, that it was not proved that the conditions of the policies as to payment were waived, and the time of payment extended, by the defendant or any person authorized to do so upon its behalf. The motion was denied and the defendant excepted. If this objection had been broad enough to present the question whether the agent's declarations were competent evidence to show an extension of the time for the payment of the premiums against the defendant, it would have been in time, although the proof of them was received without objection. Those declarations were not competent evidence of the existence of an agreement made six weeks before the time when they were made, against the defendant, the principal of the agent making them (*Anderson agt. Rome, &c., R. R. Co.*, 54 *N. Y.*, 334); and the omission to object to them when they were offered did not deprive the defendant of the right to insist upon their incompetency at the close of the evidence, or any other time during the progress of the trial. This was substantially held in the case of *Hamilton agt. N. Y. Central R. R. Co.* (51 *N. Y.*, 100).

But the objection actually taken did not present this point for the decision of the court. It simply presented the objection that the agent was not authorized to waive or extend the time of payment of the premiums. Whether the proof given to show that an agreement had been made for the extension was competent proof for that purpose was not mentioned nor suggested. Neither this motion nor the ground specified in its support, nor any other objection taken during the trial, presented that question. And, as it was not raised at any time during the trial, it was necessarily waived when the case was submitted to the jury. The defendant had the right to have the case tried, if it so elected, on incompetent evidence; and the omission at any time to object, is conclusive evidence of such waiver. By such conduct, even the right to a trial by jury may be waived (*Gleason agt. Keteltas*, 17 *N. Y.*, 291; *Penn. Coal Co. agt. Del. and Hud. Canal*

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Co., 1 *Keyes*, 72; *West Point Iron Co.* agt. *Reymert*, 45 *N. Y.*, 703; *Fisher* agt. *Hepburn*, 48 *N. Y.*, 41; *Delancy* agt. *Brett*, 51 *N. Y.*, 78).

The plaintiff offered in evidence a note made on the 20th day of September, 1868, given by the person whose life was insured by the policies, for the payment of the premiums upon them in sixty days after its date, containing the agreement that the policies should be null and void if the note should not be paid when it was due. This was objected to by the defendant on the ground that it was immaterial. The objection was overruled, and the defendant excepted. In one respect this was material evidence, for the authority of the agent to extend the time for payment of the premiums was controverted by the defendant; and if that had previously been done by him, with the approval of the defendant, it was a fact tending to show the existence of the authority. When the agent himself was examined as a witness, the defendant showed the transaction of 1868 fully by him; and it appeared from his evidence that the papers were sent to the defendant, who made no objection, but approved of the arrangement. This was all competent for the purpose of showing the agent's authority to change or extend the time fixed for the payment of the premiums. The agent, on the defendant's examination of him, showed that a receipt had been given when the note was taken, and there could be no well founded objection against afterward receiving the receipt itself for the purpose of having its precise terms in evidence. It was a material part of the transaction, which the defendant had taken pains to prove, and there could be no impropriety in reading it to show exactly what had been done, so far as that appeared by the receipt.

The declarations proved to have been made in one of the interviews after Mr. Dean's death, and which was objected to as incompetent, by an objection expressly confined to the particular occasion inquired for at that time, did not tend to prove the existence of any valid agreement for the extension

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of the time fixed by the policies for the payment of the premiums; and for that reason the exception taken to the decision allowing them to be proved can be of no service to the defendant. The admission of the agent, shown under it, tended to prove that the terms proposed had not been complied with by Mr. Dean; and for that reason it was entirely ineffectual as evidence against the defendant. It maintained the position of the defendant and tended to subvert the plaintiff's claim (*Vandervoort agt. Gould*, 36 N. Y., 639, 644).

The conversation which was stated by the witness Keese was of the same general nature. He said that Morton told him substantially what he had said during the trial as a witness; so that it could not possibly have done the defendant any harm. And while it was objected to, it was not because it was incompetent, but simply because it ought to have been called out on the direct examination.

The remark made by the witness concerning this conversation is equally as applicable to the one just before considered; for that was no more than a repetition of what Morton, the agent, swore to himself.

The evidence sufficiently showed the service of the notice and proof of the death of the person whose life was insured, without the declaration of the agent that they had been received by the company. They were tendered to the general agent, and after being refused by him were mailed, under his direction, to the president of the company, at its place of business, in Connecticut; and that, certainly, should be sufficient to prove compliance with the terms of the policy on this subject. Besides that, it appeared that the refusal to pay was placed by the company on the omission to pay the premiums; and that would be sufficient to constitute a waiver of all proof of death (*Post agt. Ætna Ins. Co.*, 43 Barb., 353; *Cornwell agt. Haight*, 21 N. Y., 462).

An objection was taken to the copy of the notice and proof of death, offered in evidence; but it was not objected to

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because it was a copy. The objection was expressly placed on the reasons that it did not appear that the original came to the possession of the company; that the fact of mailing was not such evidence of its receipt as to justify the admission of a copy in evidence. These reasons were not good, because the proof did show a proper service of the original. The tender to the agent, and mailing to the president as he directed, sufficiently showed the service of the notice and proof of death to comply with the terms of the policy. The only authority opposed to the validity of such a service is that of *Hodgkins agt. Montgomery Co. Mut. Ins. Co.* (34 *Barb.*, 213), and that was afterward reversed by the court of appeals (41 *N. Y.*, 620).

The agent appears to have been the general agent of the company at the city of New York, and he was authorized, as such, to transact all the company's business at that place, which included all that he did concerning this insurance; and for the reasons already given, as well as those mentioned by Mr. Justice BRADY, the judgment, after being modified as directed by him, should, with the order denying a new trial, be affirmed.

DAVIS, *P. J.*, *dissented*, on the following grounds:

First. Incompetent declarations of the agent were admitted, against defendant's objection. They were not harmless, because they were regarded by the court and jury as material and important, as appears by the charge, and because the ruling upon them established a rule of evidence for the case; and subsequent evidence of such declarations was given, to which, it must be assumed, the defendant omitted to object on that ground, in deference to the ruling that such declarations were competent.

Second. The fact that the policies were canceled in October was competent, as tending to corroborate the testimony of the agent that no extension was made — it was an act in the due course of business.

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Third. There was no evidence in the case to establish the alleged waiver, except incompetent proof of Morton's declarations. The motion for a nonsuit raised the question of absence of lawful proof of waiver. The overruling of the motion was error.

Fourth. The verdict was against evidence, and a new trial should have been granted on that ground.

The claim is of a most suspicious character, and the evidence to uphold it, I think, was illegal and insufficient. I think a new trial should be granted.

The judgment of the court, in accordance with the opinion of justices BRADY and DANIELS, was as follows: Judgment and order reversed and new trial granted, with costs to abide event, unless plaintiff, within twenty days after entry of the order herein, stipulate to deduct \$2,997.60 as of the date of the verdict, in which case judgment and order affirmed, without costs to either party.

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COMMISSION OF APPEALS.

WILLIAM MCCAFFERTY agt. THE SPUYTEN DUYVIL AND PORT
MORRIS RAILROAD COMPANY.

Liability for injuries caused by negligence of employes in prosecuting work.

Where a railroad corporation lets the contract for building its entire road to a contractor for an agreed price, and the contractor sublets a portion of his contract to a sub-contractor, and during the progress of the work, through carelessness of the workmen in blasting rock, an injury is done the plaintiff, the railroad corporation is not liable therefor.

Where the work in progress is lawful, and not a nuisance, the principal is not liable for the acts or negligence of another, unless the relation of master and servant or principal and agent exists between them.

October, 1874.

APPEAL from the judgment of the general term of the supreme court in the second department, reversing the judgment of the circuit court dismissing the complaint. The facts sufficiently appear in the opinion.

Elliott F. Shepard, for defendant and appellant.

William Barney & C. C. & S. F. Prentiss, for plaintiff and respondent.

EARL, C. — The defendant had the right to build its road in the place where it was located, and, hence, was not engaged in an unlawful enterprise. It let the contract to build the entire road to one Decker, and it seems that he sub-contracted the whole, or a portion of the work, and the blasting complained of was done by men employed by the sub-contractor. Over these men the defendant had no control. It neither

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hired nor paid them, and could not control, direct or discharge them. Hence, the rule of *respondeat superior* applies, and the principal for whom the men were working and by whom they were employed, and not the defendant, is liable for the damage done to the plaintiff. There has been difficulty in the application of this rule, growing out of the fact that it is not always easy to determine whose servant the person committing the wrong is. There is no such difficulty in this case. Every man is answerable for acts done by the negligence of those whom the law denominates *his* servants, because such servants represent the master himself, and their acts stand upon the same footing as his own. In *Hobbitt agt. London, &c.* (4 *Exch.*, 255), ROLFE, B., says: "The liability of any one other than the party actually guilty of any wrongful act, proceeds on the maxim *qui facit per alium, facit per se*. The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned."

This is not a case where defendant contracted for work to be done which would necessarily produce the injuries complained of. They were caused by the negligent and unskillful manner in which the blasts were conducted. The injuries were not occasioned in consequence of the omission of any duty which was incumbent on the defendant. It had let the contract, so far as appears, to a competent person, and had provided in the contract that he should be responsible for any damage occasioned by blasting. The defendant did not authorize or permit a nuisance upon its premises. If it had, it would have been liable for any damage occasioned by the nuisance.

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Hence, if the defendant can be held liable in this case, it must be upon the naked ground that it is responsible for the careless acts of the sub-contractor's servants, over whom it had no control.

There is no authority in this state for imposing such a liability under such a state of facts.

In *Pack agt. The Mayor, &c., of New York* (8 N. Y., 222) the defendant had let a contract to one Foster to level and regulate Bloomingdale road, in the city of New York, and Foster had sub-contracted with one Reiley to do all the blasting of rocks upon the job; and Reiley, while engaged in blasting, threw rocks into the plaintiff's house, doing damage for which the action was brought. It was held that defendants were not liable, that Reiley was not their servant, and, hence, that they were not, under the rule of *respondent superior*, responsible for his acts. This case was approved and followed in *Kelly agt. The Mayor, &c., of New York* (11 N. Y., 432). In the latter case the defendants had let the contract of grading a street, in the city of New York, to one Quinn; and his servants, in blasting rocks in the street, caused a stone to be thrown against plaintiff's house, and for the injury thus caused the plaintiff sued. It was held that defendant was not responsible for the negligence of Quinn's servant. It is impossible to distinguish these cases from the one now before us. They have never, so far as I can discover, been questioned.

In *Storrs agt. The City of Utica* (17 N. Y., 104), while judge Comstock criticised the case of *Blake agt. Ferris* (5 N. Y., 748), he expressly approved these two cases. In the case of *Storrs agt. The City of Utica*, the defendant was held liable because it owed a duty to the public to keep its streets in a safe condition for travel, and not because it was responsible for any negligent act of the contractor.

In *Water Co. agt. Ware* (16 Wallace, 566), the defendant had taken a contract to lay water pipes along the streets of the city of St. Paul, and then sub-contracted the work, and

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the sub-contractor, by his carelessness, caused the injury sued for. The defendant was held liable because he had agreed in his contract with the city to be responsible for all such damages.

CLIFFORD, J., lays down the following rules, applicable to such cases: "When the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but when the obstruction or defect which occasioned the injury results directly from the acts which the contractor agreed and was authorized to do, the person who employs the contractor and authorizes him to do these acts is equally liable to the injured party."

In this case the injury complained of did not result directly from anything which the contractor was bound by his contract to do, but from the careless and wrongful acts of the men engaged in the blasting. If the blasting had been properly done the plaintiff would have suffered no damage.

In *Butler agt. Hunter* (7 H. & N., 826), the plaintiff and defendant were owners of adjoining ancient houses, and an architect, employed by the defendant to superintend the repairs of his house, having considered it necessary to pull down and rebuild the front wall, agreed with a contractor to do the work for an estimated price; and the workmen of the contractor, in pulling down the wall, removed a bad summer which was inserted in the party-wall between defendant's and plaintiff's house, without taking any precautions by shoring or otherwise; in consequence of which the front wall of the plaintiff's house fell; and it was held that there was no evidence for the jury of any liability on the part of the defendant.

POLLOCK, C. B., said: "No doubt, when the act is in itself a nuisance, the party who employed another to do it is responsible for all the consequences, for then the maxim *qui facit per alium facit per se* applies. But where the mischief

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arises, not from the act itself, but the improper mode in which it is done, the person who ordered it is not responsible, unless the relation of master and servant exists."

In *Rodie agt. The London, &c.* (4 *Exch.*, 244), a company empowered by act of parliament to construct a railway, contracted, under such act, with certain persons, to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetence. The workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath, along the highway, by allowing a stone to fall upon him; and it was held that the company was not liable, and that the terms of the contract did not make any difference. ROLFE, B., said:

"The wrongful act here could not in any possible sense be treated as a nuisance. It was a simple act of negligence; and in such a case there is no principle for making any distinction by reason of negligence having arisen in reference to real, and not to personal property." During the argument of the case, PLATT, B., put the following question to counsel: "Suppose the occupier of a house were to direct a bricklayer to make certain repairs to it, and one of his workmen, through his clumsiness, was to let a brick fall upon a passer-by, is the owner liable?" The decision of the case answers this question in the negative. In *Allen agt. Willard* (57 *Penn.*, 374), AGNEW, J., said: "The principle extracted from the cases is said to be, that a person, natural or artificial, is not liable for the acts or negligence of another, unless the relation of master and servant, or principal and agent, exist between them; and that when an injury is done by a person exercising an independent employment, the party employing him is not responsible to the person injured. This doctrine, it must be noticed, has regard to cases where the purpose of the contract is entirely lawful, and where the owner of the property upon which the contract is to be executed can lawfully commit its performance to others."

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The case of *Hays agt. The Cohoes Company* (2 Coms., 159) is not an authority, and has never been regarded as an authority upon the questions involved in this case. It was there assumed that the persons who caused the injuries complained of were the agents and servants of the defendants; and the only question considered in the court of appeals was, whether the defendants could be made liable without the proof of negligence.

A further reference to authorities cannot be useful. They are not uniform and free from confusion. It has not always been easy to determine whether the relation was that of master and servant or that of contractor and contractee; and some difficulties have been occasioned by attempting to establish a distinction between the owner of real and of personal property, and to hold the former to a stricter liability than the latter, by making them responsible for the negligent use and management of their real estate, and negligent conduct upon it by contractors and their agents. But this distinction has been quite thoroughly repudiated, as is shown by the case above cited, and also by *Sherman and Redfield on Negligence* (95, and cases cited in note).

I am, therefore, of opinion that the disposition of this case at the circuit was the proper one, and that the order of the general term must be reversed, and judgment at the circuit affirmed, with costs.

DWIGHT, C. dissents.

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NEW YORK SUPERIOR COURT.

THOMAS HAMILTON agt. THE THIRD AVENUE R. R. Co.

Verdict set aside and new trial granted on the ground of excessive damages.

Where the evidence of the plaintiff, on the trial, showed that he was a passenger on the car of defendant's horse railroad; that the plaintiff was hauled out of the car, on to the front platform, by the conductor; that the plaintiff held on to the handrail while the conductor pushed him; that the car started; that he was on the lower step of it, when the conductor pinched his hand, and he had to let go and get off:

Held, that on the present trial the court charged the jury in accordance with the rule of damages indicated by the court of appeals, which granted a new trial therein (53 N. Y., 25) because the court had charged the jury that they might give exemplary damages (and the jury gave \$500 damages), and it was held that the plaintiff had a right to compensatory damages only, including not only compensation for the loss of time and the amount the plaintiff had to pay for his passage upon another car, but, in addition thereto, the injury done to his feelings might be taken into consideration by the jury, and a suitable recompense given therefor.

The damages awarded on the last trial are three times what they were on the previous trial, and that, also, under instructions from the court that they must be purely compensatory, in accordance with the views expressed by the court of appeals upon granting a new trial in this action. The amount appears to be excessive, and the verdict should be set aside and a new trial granted, on payment of costs of the last trial and of opposing this motion.

Special Term, October, 1874.

THE defendant moves, upon a case and exceptions at the special term, that the verdict rendered at the last trial of this action be set aside, and a new trial granted.

Clarkson N. Potter, for defendant.

Count Joannas, for plaintiff.

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CURTIS, J.—The defendant claims that the verdict should be set aside, upon exceptions to portions of the charge and refusals to direct special findings, and to charge as requested. There were two exceptions to portions of the charge. Considering the charge as a whole, and looking at the evidence, the parts of the charge excepted to do not appear to be unfair or calculated to mislead the jury. Nor do the exceptions to the refusals to charge afford any just reason for ordering a new trial. The exception to the refusal of the judge to direct special findings by the jury cannot be sustained. Section 261 of the Code leaves that direction to the discretion of the judge before whom the action is being tried; and the case fails to show any error on the part of the judge, or any unreasonableness in the exercise of that discretion.

The defendant also seeks a new trial on the ground that the evidence was insufficient to warrant the verdict, and that the verdict was against the weight of evidence. If the jury believed the evidence of the plaintiff, it is sufficient to entitle him to recover. The action has been twice tried, and on each occasion, after seeing and hearing all the witnesses, the jury have found for the plaintiff. It was their duty to determine the questions of fact in dispute. The court placed it before them, and charged that if they believed that the plaintiff's story was "made up, as it may have been, out of whole cloth, if it is not true," that they should find a verdict for the defendant. The testimony on the part of the defendant tended strongly to show that the plaintiff could not have been upon the cars that were numbered, as he testified those were upon which he was a passenger, and yet, upon a careful consideration of this testimony, it is apparent that the employees of the defendant based their evidence upon what was the time-table of the defendant at the date of the occurrence complained of, and upon what was the general custom and mode of the defendant at that period in transacting its business, rather than upon any actual and personal knowledge and recollection. The case is, not one where the verdict should be

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set aside as against the weight of evidence, or by reason of the insufficiency of the evidence.

There is more difficulty in disposing of the defendant's claim, that the verdict should be set aside because the damages were excessive. On a former trial of this action, there was a verdict for the plaintiff for \$500. A new trial was granted (53 *N. Y.*, 25), because the court had charged the jury that they might give exemplary damages; and it was held that the plaintiff had a right to compensatory damages only, including not only compensation for the loss of time and the amount the plaintiff had to pay for his passage upon another car, but, in addition thereto, the injury done to his feelings might be taken into consideration by the jury, and a suitable recompense given therefor. There was the same evidence on this trial as on the former — that the plaintiff was hauled out of the car, on to the front platform, by the conductor; that the plaintiff held on to the handrail while the conductor pushed him; that the car started; that he was on the lower step of it, when the conductor pinched his hand, and he had to let go and get off.

On the present trial, the court charged in accordance with the rule of damages indicated by the court of appeals, limiting them, in case they found for the plaintiff, to compensation for his loss of time and additional fare, and also to compensation for no other injury than such injury as his feelings sustained. The injury to his feelings must have been purely a matter of mental emotion, for which compensation is to be rendered in proportion as they are uncomfortable or painful. All compensation for bodily pain and exposure — if any such there was in the way in which he testifies he was removed from the body of the car, forced down the steps of the front platform while it was in motion, and persuaded to let go the handrail — was carefully excluded from the consideration of the jury by the court.

The damages were, in effect, limited to compensation for the injury to the plaintiff's feelings, as the loss of time and

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the additional fare paid by the plaintiff were trivial. Men differ very much in their liability and capacity to suffer from injured feelings. There is no standard of human sensitiveness, and no mean temperature of human emotions, and no settled tariff of compensation when they suffer this class of pain. In the administration of justice, some kind of approximation to what is compensation for this species of suffering is aimed at, yet it is not easy to define it; but it is certain that juries, sometimes moved by the appeals of counsel, and sometimes, perhaps, by prejudice or sympathy, have, in such cases, rendered verdicts that have been excessive.

The plaintiff testified that he felt that every person on the sidewalk was looking at him, and thinking he was put off as a thief or a pickpocket, or something or other; that he could not tell what to think; that he was sadly disappointed about it, and that the like never happened to him before. Another man, of a different temperament, might have regarded the whole occurrence, and that the people around thought he was a pickpocket or a thief, with utter indifference. Still, as human nature is at present constituted, most men, when forcibly ejected from a railroad car on which they have a right to be transported, or kicked or otherwise subjected to personal ill treatment or degradation, especially in the presence of spectators, are liable to have their feelings injured, and the law awards them compensation. If the law did not give them compensation, and a just compensation, for this class of wrongs, society would suffer in proportion as human violence and human passions, by this omission, were let loose and invoked to resist or avenge the injuries.

Considering the facts as they must have been found by the jury in this case, and the surrounding circumstances, and the parties themselves, I am inclined to think that the jury have awarded damages that are excessive. It is not difficult to see that they may very readily have done so. Swayed by the sympathies or the prejudices called forth upon a trial, men will sometimes render a verdict for an amount of damage in

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excess of what might be expected from the exercise of a cool and deliberate well considered judgment, and which it would be unjust to sustain.

The damages awarded on the last trial are three times what they were on the previous trial, and that, also, under instructions from the court that they must be purely compensatory, in accordance with the views expressed by the court of appeals upon granting a new trial in this action. The amount appears to be excessive, and the verdict should be set aside and a new trial granted, on payment of costs of the last trial and of opposing this motion. The practice under which courts have ordered the reduction of a verdict to a sum named, as the alternative of a new trial, as in *Murray agt. The Hudson R. R. Co.* (47 *Barb.*, 196), and in other cases of this character, can, as it now appears, in view of the principle established in *Copin agt. Delany* (38 *N. Y. R.*), no longer be followed.

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NEW YORK SUPERIOR COURT.

HENRY HUENERMUND agt. THE ERIE RAILWAY COMPANY.

Jurisdiction — trespass on real estate — land out of the state.

This court has no jurisdiction of an action brought against a railroad company organized in this state for negligently causing sparks and burning wood to be thrown on the plaintiff's trees and plants, and setting fire to and burning and damaging the trees and plants growing on the lands of the plaintiff, in the state of New Jersey, and ruining and destroying them.

Trespass for injuries to real estate or its corporeal hereditaments, cannot be brought beyond the jurisdiction where the land is situated.

Special Term, October, 1874.

DEMURREE to complaint.

*Charles Wehle, for plaintiff.**Mr. McFarland, for defendant.*

SPEIR, J.—The plaintiff claims to be the owner of lands immediately adjacent to the Hackensack branch of the Erie Railway, situated in Bergen county, in the state of New Jersey, which lands were planted with, and used for the cultivation of, valuable trees and plants. That the defendant is a corporation organized under the laws of the state of New York, and is lessee of the railroad—the line called the “Hackensack Branch” of the Erie Railway—which was used and operated by the defendant exclusively. That the defendant, in running trains on this branch, negligently

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caused sparks and burning wood to be thrown on the plaintiff's trees and plants, and set fire to, burned and damaged the trees and plants growing on the lands of the plaintiff, and ruined and destroyed them, and he claims damages to the amount of \$5,000.

The plaintiff demurs that this court has no jurisdiction.

All the books agree, that, when the subject-matter in litigation is the ownership or possession of real estate, the action is essentially local, and the remedy must be sought in the state where the land is situated. It is also well settled, in accordance with this principle, that trespass for injuries to real estate cannot be brought beyond the jurisdiction where the land is situated, and that the difficulty or uncertainty of the remedy in the local forum will not authorize the courts of another state or district to entertain the suit.

It is an elementary principle in the law, that corporeal hereditaments are confined to land, which includes not only the ground or soil, but everything which is attached to the earth, whether by the course of nature—as trees, herbage and water—or by the hand of man, as houses and other buildings (3 *Kent's Com.*, 531, citing *Coke-Litt.*, 4 a). The king's bench, in *Donaldson agt. Matthews* (4 *Term R.*, 503), held that an action could not lie in England for the expulsion of the plaintiff from his house in Canada.

The above principles furnish the answer to the plaintiff's case under all the aspects he claims, and these principles are carried out in the following cases: *Watts, adm'r, agt. King* (23 *Wend.*, 483); 6 *Hill*, 48; 2 *Denio*, 639; 6 *Gray (Mass)*, 122.

The defendant must have judgment on the demurrer, with costs.

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SUPREME COURT.

JAMES MARSHALL, appellant, agt. MARTHA G. MARSHALL,
respondent.

The validity of a marriage, contracted and solemnized in another state, by parties resident in this state.

Where a plaintiff has, by the judgment of the court, been convicted of adultery in an action of divorce brought by his wife, and prohibited by the decree from marrying again during the life of his divorced wife, he cannot, while in such contempt, sustain an action against his second wife for divorce on the ground of adultery, although the contract for the second marriage was perfected and solemnized in another state, both parties immediately before and after the marriage being residents of this state. Under our statute, the second marriage must be pronounced absolutely void.

DANIELS, *J.*, *dissenting*. — Holding that our statute does not declare that the marriage of the guilty party, solemnized in some other state or country, where that can be lawfully done, shall be void, and consequently it cannot include such marriage, for the laws of a state, not rendered specially applicable to acts performed in other states or countries, have no effect beyond the territorial limits of the sovereignty or state enacting them.

Because the plaintiff is in contempt in one action, it is no reason why he shall not be at liberty to commence and prosecute another in no way connected with the one in which the contempt was committed.

General Term, First Department, October, 1874.

APPEAL by plaintiff from an order of a special term of the supreme court refusing, on his application, to settle issues in the cause to be tried by a jury.

Ira Shafer, for appellant.

C. W. Sandford, for respondent.

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WESTBROOK, *J.* — The pleadings in this cause admit that the plaintiff, prior to his alleged marriage with the defendant, had been married to one Elizabeth Marshall, who in the year 1858, by the judgment of this court, procured against the present plaintiff a judgment of divorce, for adultery committed by him. The decree in that cause contained the clause prescribed by the statutes of this state, permitting the said Elizabeth to marry again, but forbidding the present plaintiff from contracting a second marriage during the lifetime of the said Elizabeth. The pleadings further concede, that the parties to this action — they both then residing in this state — were, on the 20th day of September, 1866, married at Susquehanna in the state of Pennsylvania. After the marriage the parties returned to this state and resided therein. The defendant avers that the plaintiff's object in going to Pennsylvania to be married was to avoid an indictment for bigamy, to which he would, as she alleges, have been liable if the marriage had been contracted here. The plaintiff, while denying this to have been his object, admits that the ceremony was performed in the state of Pennsylvania, to which they went for the purpose of contracting the obligation of marriage; and declares that they "at the time of the said intermarriage were, and from the time of the said intermarriage have been * * * and now are, inhabitants of this state.

After the parties to this suit had become, as it is alleged by the plaintiff, husband and wife, they lived together as such until about July, 1873, when the plaintiff, claiming the rite of marriage to be a legal and valid one, commences this action to be relieved and free from its obligations on account, as he declares, of the adultery of the defendant.

The cause being at issue, a motion was made at the special term for issues to be tried by a jury, and denied; judge DONOHUE, who held the term, deciding, that a citizen of this state, who in contempt of its laws and its judicial decree, had contracted a second marriage, had no standing whatever in

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the court, for the purpose of being relieved from obligations which had been assumed contrary to the injunctions of such laws and such decree.

The plaintiff, appealing to this court from such order, presents two questions for adjudication: First. Was the marriage with the defendant a legal and valid marriage? Second. If it was, has the plaintiff, who disobeyed the judgment and decree of a court of competent jurisdiction, any standing whatever in that court, when he comes therein and asks to be relieved from obligations which he has assumed contrary to its express command.

In the discussion of these questions it will be observed that both parties, at the time of the alleged marriage, were residents of this state, owing allegiance to its laws. When they left its territory for Pennsylvania and had the marriage ceremony there performed, it was (as must be assumed from their immediate return) with the intention to make this state their domicile; and although it may be true that the husband did not fear an "indictment for bigamy," if the ceremony was performed here, and which he had no reason to fear (*People* agt. *Hovey*, 5 *Barb.*, 117), still, from the express averments of the complaint, it is evident that while residing here they went into another state, for the simple purpose of being united in marriage, with the intent of immediately returning and enjoying the protection of the laws of this commonwealth. And it must be further noticed that we are not—as this appeal is by the husband from an order made on the objection of the wife—to consider what legal remedy the defendant may have, if her allegation is true that she contracted the marriage in ignorance of the plaintiff's condition as to the former one, but only and solely whether the plaintiff has contracted a legal marriage, which he, for any alleged misconduct of the defendant, may ask this court to annul.

The validity of a marriage like the present has been an open question in this state. In *Cropsey* agt. *Ogden* (11 *N. Y.*, 228), JOHNSON, J., says: "It is not necessary for us to

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consider what would have been the effect of a marriage celebrated out of this state. No such question was presented in the case." In *Haviland agt. Halstead* (34 N. Y., 643), DAVIES, Ch. J., says: "The question is not here, whether a marriage contracted in another state, and solemnized there between these parties, would be a legal and valid marriage here, but whether, in effect, this plaintiff is a party to an illegal and void contract by the laws of this state." It is true that SMITH, J. (pp. 646, 647), in the same case, says: "It may be assumed that if a marriage had taken place between the parties in New Jersey, in pursuance of their contract, such marriage would have been recognized and treated as valid by the courts of this state, even although the parties had gone into New Jersey with intent to evade the laws of this state;" but this doctrine has never been so held in this state. In support of this statement, the learned judge cites several Massachusetts cases, and Story on "Conflict of Laws." It will be shown hereafter that this is not now the law of Massachusetts, and that in the most recent edition of judge Story's work a marriage like the present is declared to be void.

As the question, then, is as yet unadjudicated here, let us see what statutes we have for our guidance.

First. A marriage, contracted by a person situated as this plaintiff is, is forbidden. "Whenever a marriage shall be dissolved, pursuant to the provisions of this article, the complainant may marry again during the lifetime of the defendant; but no defendant convicted of adultery shall marry again until the death of the complainant (*Vol. 2 Edmond's ed. Stat.*, p. 152, § 49).

Second. But not only is such a marriage forbidden, but another provision, same volume of statutes (p. 144), reiterating the forbidding, declares "every marriage contracted in violation of the provisions of this section shall, except in the case provided for in the next section, be absolutely void." The exception relates to a marriage contracted by a person

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whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time."

I am aware that it is argued that our statutes are fully satisfied by a construction which limits their prohibition and declaration to a second marriage contracted within this state, and that our legislature did not intend to pronounce one void which was celebrated beyond that limit. In answer to this position, it is insisted that however plausible the suggestion is, it involves consequences so grave that courts should never adopt it, and thereby impute an intent to our lawmakers to do that which the moral sense condemns. If the assumption be true that the legislature of New York only intended to declare the second marriage void when the same took place within its state lines, then it must also be assumed that they intended to permit a party divorced for his or her adultery to go beyond these limits and marry again whilst the former husband or wife was living; and that this was done when its evident effect, as could be plainly seen, would be the destruction of the system of marriage and divorce which they had created. Will it be seriously argued that this was intended? That our legislature really designed, when either party to the marriage relation desired to sever that tie and contract another, to place every facility within easy reach so to do, and to tempt that party to sin to accomplish the purpose? The divorced citizens of New York who have sought other states as a residence to dissolve a contract over which, for the causes assigned, our courts had no power, have certainly been subjected to a useless and unnecessary expense, if our laws are to be construed in accordance with this view of legislative intent. Why did not these persons commit an open act of adultery, and when freed in this state by a decree of divorce granted for that act, cross over into New Jersey or Pennsylvania, celebrate there a second marriage, and at once return to our state to enjoy its advantages? This, it is argued, would be all legal and proper, and just what was intended. Can a con-

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struction which imputes such an intent be sound? Its statement is the best answer.

But again. That portion of our statute, before quoted, which declares a second marriage "absolutely void," has been construed by the court of appeals in our state, in *Cropsey* agt. *Ogden* (11 *N. Y.*, 228). In speaking of the first marriage, judge JOHNSON (*page* 233) says: "It is not necessary that the prior marriage should have taken place in this state, or after the statute took effect. A marriage at any time and anywhere, answers the requirement of the statute." And, again (*page* 234), he says: "The prohibition there relates to the case of either party to a marriage, whenever and wherever contracted, both the parties to which are living, and prohibits either party to contract a second or other subsequent marriage during the lifetime of the other, except in certain cases specified." If the legislature, in the sections of the statutes referred to, was speaking only of marriages in this state, then this decision seems unsound. There is no more limitation upon the place of the second marriage than there is upon that of the first, and the construction which makes the one broader than the other must add words which are now absent. Says the statute (2d vol. *Edmonds' ed.*, p. 144, sec. 5): "No second or other subsequent marriage shall be contracted by any person during the lifetime of any former husband or wife of such person;" and if contracted, except in two specified cases — of which this is not one — it shall "be absolutely void." It would be difficult to use language more comprehensive: "No second or other subsequent marriage shall be contracted" — it covers all space, and reaches as far as the mandate could be made effectual. Having solemnly said that "No second or other subsequent marriage" should be contracted, and in no wise limited the force of the prohibition, the interpolation of the words "within this state" is not justified by any sound rule of construction, and involves consequences too grave and serious to be tolerated.

We assume, then, that so far as it is possible for this state

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to protect itself against a marriage, such as this plaintiff has contracted, by the force of express legislation, it has so done; and if the courts of this sovereignty are bound to respect and hold valid that which its own legislature has declared "absolutely void," and to so hold in favor of one of its own citizens, who, at the time he did the forbidden act, as such citizen owed to its laws allegiance and obedience, then it may well be doubted whether it is able to protect its own morals or the sanctities of the married state within its own limits. Nay, it is a matter of no doubt whatever, for if the principle contended for by the plaintiff in this cause is sound, then all marriages depend upon the will of the parties who have assumed these obligations, and new alliances can be again contracted, and those ties again sundered, as may suit the will or caprice of either. This result could never have been intended, and it is therefore held that our statute forbids every second marriage, and the limitation, if any there be, is one of power only. So far as it can reach it must reach and be applied.

We do not now discuss the question whether, if the plaintiff had removed to Pennsylvania, and become a *bona fide* citizen of that state, and whilst so residing there, had contracted marriage, and after such marriage had returned to this state, we should have been compelled to acknowledge the legality and validity of the act. That issue is not before us, and upon it no opinion is expressed. The courts of New York are now dealing with one of its own citizens, who has never renounced allegiance to its laws, and who, whilst residing here, crossed its boundary into a neighboring state for the purpose of entering into a contract, which should, despite our statute prohibition, be executed here. Such an act, declared "absolutely void" by our statutes, as we have shown, cannot, as is earnestly believed, possibly be held valid by our courts; and such a decision would be contrary to right reason and sound morals and to carefully considered cases.

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It is true that, at one time, marriages such as has been contracted in the case before us have been held good in Massachusetts (*Medway* agt. *Needham*, 16 *Mass.*, 157; *West Cambridge* agt. *Lexington*, 1 *Pickering*, 433); but it seems to have been so held when the statute of that state simply prohibited them, without declaring them void when contracted. Since those decisions were made, however, that state has declared, by express enactment, that marriages contracted by residents thereof, under the same circumstances with the present, in another state or country, shall be deemed void (*R. S. of Mass.*, chap. 75, sec. 6); and the validity of that statute has been recognized by its courts (*Sutton* agt. *Warren*, 10 *Metcalf*, 451; *Commonwealth* agt. *Hunt*, 4 *Cushing*, 49. See opinion of DEWEY, J., pp. 50 and 51). A well known Massachusetts author (Bishop), in his work on "Marriage and Divorce," whilst maintaining that marriages like the present, when simply forbidden, must be treated as valid, if legal in the state where contracted, also admits (*sec.* 369, *vol.* 1, 5th ed.) that "this rule, like other common-law rules, is subject to the legislative control," and that it has been so controlled "in Massachusetts * * * since the contrary point was decided by its courts." Of the soundness of this doctrine there can be, it seems to us, very little question, unless each state is prepared to surrender its own sovereignty, and place its laws regulating marriage relations among its own citizens entirely at the mercy of other states or countries.

New York has not only forbidden such a marriage as the plaintiff has contracted, but has pronounced it, as we have previously endeavored to show, "absolutely void." The provisions of our statutes are more general and far reaching than those of Massachusetts. The latter simply make void a marriage contracted by a resident of that state in another in fraud and evasion of its prohibition, whilst ours has declared it "absolutely void," without regard to the intent, and without regard to the locality of its celebration. If the Massachusetts statute is binding upon its courts, so is ours upon

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us; and if the cases decided in that state, prior to its present statute, have any authority here, surely those which sustain its more recent legislative enactment, making such marriages null and void, should cause our courts to follow our own statute declaration, and pronounce this marriage (as to the plaintiff, at least), in the words thereof, "absolutely void."

This principle has also been decided in the house of lords, in England, in *Brooks agt. Brooks* (7 *Jurist*, 422). In that case (page 423) CAMPBELL, lord chancellor, said: "There can be no doubt of the general rule that a foreign marriage, valid according to the law of the country where it is celebrated, is good everywhere. But, my lords, while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage would be good everywhere. But if the contract of marriage is such in essentials as to be contrary to the law of the country of domicile, and is declared void by that law, it is to be regarded, as void in the country of domicile, though not contrary to the law of the country in which it was celebrated. This qualification upon the rule that a marriage valid where celebrated is good everywhere, is to be found in the writings of all eminent jurists who have discussed the subject."

It is claimed, however, that this opinion of lord CAMPBELL, which was sustained by the house of lords of Great Britain, has no application to the case before us. It is submitted in reply, that it decides the very point at issue. The question in *Brooks agt. Brooks* was in reference to the validity of a marriage with a deceased wife's sister, contracted by British subjects in Denmark, who, after the rite had been

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performed in that country, returned to England to reside. Such a marriage, though pronounced incestuous by the law of England, was not so in Denmark, nor was it forbidden by the common law of civilized nations. It was because the law of England forbade it, that objection was made to its validity. The exact question to be determined was: if citizens leave their own country and contract a marriage abroad, such marriage being forbidden by the law of the country of their residence, but allowed by the law of the country where it is contracted, and being celebrated with an intent to resume, and followed by an actual resumption of their old residence, what law governs the validity of the contract — that of the domicile, or of the place where it was consummated? The answer was, the law of the domicile controls. Is not this the identical question we are to answer? These parties resided in New York; they went to Pennsylvania — not to change their residence, but to be married and then return — which they did. If the *lex domicilii* and not the *lex loci contractus* controlled in *Brooks agt. Brooks*, it must also govern in the case before us. The mere fact that in the former case the law of the domicile forbade the marriage on one ground, while in the latter it forbade and made it void on another, does not alter the result or shake the authority. The great point determined was that the *lex domicilii* of marriage follows citizens who go abroad to contract it, contemplating a return and actually returning. So far, too, as the case shows, *Brooks agt. Brooks* did not turn upon the fact that the law of England pronounced such a marriage, as was celebrated in that case, void, if parties went abroad to contract it in fraud of and to evade the English statute. Nor does it seem from the case as reported, that the English statute was specially framed to meet such a case; but it was put upon the square ground that when the home law in general terms declares the marriage void, that law follows the parties and nullifies the act when the parties return and resume their actual residence in their original country. It is submitted, then, that this

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important case covers every question before us, and is so reasonable and sound in its conclusions that it should be adopted and followed here. No other rule will enable a state to make its own laws of marriage and divorce effectual, and place that relation beyond the legislation of others.

Brooks agt. *Brooks*, and the opinion of lord chancellor CAMPBELL, is expressly approved in *Story on Conflict of Laws* (7th ed., § 124). In that work, after stating the rule laid down by the lord chancellor, that a foreign marriage is good, if contrary to the non-essentials of the law of the domicile, provided it be in conformity with the regulations of the state where it is contracted, but not good if contrary to the essentials and declared void by the law of the domicile, though permitted and allowed by the *lex loci contractus* it is void. "It seems to us that this qualification of the rule as to the general binding force of the law of the place of celebrating of marriage will enable us to steer clear of most of the embarrassments attending the question, and at the same time to reconcile most, if not all, of the conflict in the opinions of the learned jurists upon the subject. And, unless this qualification is allowed, there is produced a state of anarchy and confusion upon the subject of this fundamental relation of society, whereby any state may be compelled to recognize the perfect validity and binding force of polygamous marriages. For polygamy is probably recognized by the law of nations, if the majority of the people of the earth are allowed to determine that question by an appeal to the past history of the race. And if the practice of the Hebrews were conclusive upon the matter, that will be found to bear in the same direction."

It is scarcely necessary to pursue this discussion. We freely admit that learned publicists and reported cases differ. This state, where the question has never been decided, is free to choose the rule which, in its view, is the sounder in reason and most conducive to public morals. The effect necessarily resulting from a counter opinion requires us to hold that our

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legislature intended not only to prohibit but to declare void such a marriage as we have now before us. The later cases, and the later editions of Bishop and Story, hold that a state can declare it void. Unless we are prepared to say that adultery has no effect upon the right of the guilty party again to marry, when divorce has been granted for that sin, and in so holding to tempt parties to do the act, that they may contract a second marriage, we should adjudge these parties not legally husband and wife, and thus adopt that as the law of all similar cases. It is the alleged wife who makes the point, and she cannot complain if we hold it well taken. If there be innocent parties whom this decision will affect, the law affords them some redress in other forms. It is better, far better, that a few should suffer rather than that a principle should be held which will disturb many a home, and leave many a wife without a husband, whilst he, despite the sin and the forbidding of our laws, is legally married to another, and to him, for a short time at least, a more congenial companion.

Apart, however, from the question discussed, we think that the decision of the special term was also right, for the reason there assigned. The plaintiff was forbidden, by the judgment of this court, pronounced when divorcing him from his former wife, from contracting a second marriage during her life. That command he has disobeyed; and now he asks the identical court which forbade the act to absolve him from the very contract which he perfected contrary to its mandate. If he has incurred obligations to another by his disobedience to the court, he should be allowed to relieve himself as best he can. This court has power, as was determined in *Brinkley agt. Brinkley* (47 N. Y., 40), to prevent any person in contempt from taking "any aggressive proceedings against his adversary." It may strike out an answer, and thus deprive him of a trial. This plaintiff, confessedly in contempt, takes an aggressive step against another, and founds the right to proceed upon an act which the court had forbidden. If issues, by striking out an answer, may be refused to a defendant who

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sets at naught the authority of the court, they surely may be to a plaintiff who, in asking those issues, tells this tribunal that its command is impotent and its judgment a nullity.

I am aware that the question in *Brinkley* agt. *Brinkley* arose out of a proceeding in that cause, and that that case does not in terms cover one when a party in contempt seeks to bring another suit. It does, however, decide that, even though a party may be authorized by law to bring or defend a suit, his proceedings therein may be stayed if he is in contempt. The statute which gives the right to a suitor in court to bring or defend an action is the same which authorizes him to proceed in a second. Concede the power of the court in any case to strike out a pleading, because of a contempt committed by that party toward the court, and it necessarily follows that the only restraint upon the power of the court toward that party is the exercise of a sound discretion. No greater authority is exercised in the refusal to allow a person in contempt to bring or defend a second suit than in the refusal to permit the first to proceed or its defense to be heard. The one is as great a violation of an apparent statute right as the other. The penalties of contempt were originally prescribed by the courts, and if a precedent for the power exercised in this case cannot be found in the records of the past, it can create one now for this party and this occasion, and thus make a precedent for the future.

It would not, it is fully conceded, be the exercise of a sound judicial discretion to hold that a party in contempt has no right to bring any action in this court; but whilst conceding this, it is maintained with equal earnestness that when a party seeks relief from an act which he has been forbidden to do, the court to which such application is addressed has a right to withhold the remedy asked. This, we submit, is the exercise of a sound judicial discretion, and is neither arbitrary nor unreasonable. Mr. Marshall had been forbidden, by the solemn judgment of this court, from contracting a second marriage. This suit is founded upon his disobedi-

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ence of the command. By it we are informed that our mandate has been disregarded and our power defied; and whilst communicating this information we are told that that which we have forbidden to be done is valid and legal despite the forbidding, and that we are compelled to use the power which the law has conferred upon us to aid him in the offense he has committed.

We cannot consent thus to stultify ourselves. We cannot so hold; and we decide that this is a proper case to refuse the relief sought, and we now place such a refusal among the penalties of such contempts, if it never has been before so adjudicated.

The order of the special term appealed from should be affirmed, with costs.

DAVIS, *P. J.*, *concurring*.—I am of opinion that the statute ought to be so construed as to apply to a case where a party resident and domiciled in this state, and without any intention of changing his residence, steps across the state line to pass through the ceremony of marriage, intending to return, and actually returning to this state, and there continuing his residence.

At all events the question is one that has not been settled to the contrary in this state, and the most direct way to bring it before the court of last resort is afforded by an affirmance of the order. I have concluded, therefore, to concur with my brother WESTBROOK.

DANIELS, *J.*, *dissenting*.—The importance of the questions discussed in the opinion of Mr. Justice WESTBROOK not only justifies but requires a statement of the reasons for dissenting from the conclusions maintained by that learned judge. It affects the rights and the validity not only of the plaintiff's marriage but also that of all others who have solemnized their marriages in other states after having been prohibited from marrying again during the lifetime of a former husband or wife, by the judgment or decree pronounced by one of the

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courts of this state. This prohibition follows the statute of the state, and it includes all those cases, and only the cases, where a former marriage may be dissolved by judgment or decree, by reason of the marital criminal misconduct of the party affected by the prohibition. Whenever a marriage may be dissolved by any one of the courts of this state for the criminal misconduct of one of the parties to it, that party is prohibited from marrying again during the lifetime of the innocent party. A preceding marriage, entered into by the plaintiff, was so dissolved by this court, on the application of his innocent wife, and he was prohibited by the judgment entered from marrying again during her life. But notwithstanding that, while continuing to inhabit this state, he contracted another marriage, with the defendant, which was solemnized in the state of Pennsylvania. And to hold him released from its obligations now would simply reward him for the wrong which he then committed.

It does not appear that the defendant left the state, for the solemnization of that marriage, with the design of evading its laws, and doing there what would be plainly unlawful here, and for that reason she must be acquitted from all intentional wrong, while the effect of holding her marriage void would simply punish her and exonerate her criminal husband, and that is a result which should not be maintained unless clearly required by the laws of the state.

That the laws require no such severity by construction appears very clearly from the provision which has been made upon this subject, for by that a second marriage by the guilty party in the preceding action is not prohibited "whenever or wherever contracted;" but the prohibition applies to the subsequent marriage of such party whenever or wherever the previous marriage may have been solemnized, provided it has been dissolved under the laws of the state. That was the decision made in *Cropsey agt. Odgen* (1 *Kernan*, 228), and it was all that the court could be then called upon to decide; whether such a marriage as was solemnized between these

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parties was valid and binding within this state was a point not before the court, and no opinion was expressed upon it. The statute of this state simply prohibits the guilty party, in a judgment dissolving the marriage into which he or she may have entered, from marrying again during the life of the other party, and then, in general terms, it provides further that every marriage contract in violation of the prohibition shall be void (3d *B. S.*, 5th ed., 227, sec. 4). It does not declare that the marriage of the guilty party solemnized in some other state or country where that can be lawfully done shall be void, and consequently it cannot include such marriages, for the laws of a state, not rendered specially applicable to acts performed in other states or countries, have no effect beyond the territorial limits of the sovereignty or state enacting them. They are enacted for the government and regulation of the conduct of the citizens and inhabitants of the state enacting them, and apply, when no different intent is manifest, to acts performed or to be performed within its territorial borders. The principle applicable to this subject is thus stated by a very able modern writer and compiler: "It is equally a necessary result of the independence and distinct sovereignties of the several states that neither their statutes or other laws have any inherent authority, nor are they entitled to any respect extra territorially or beyond the jurisdiction that enacts them; but, by a kind of courtesy or comity between states and nations, the principle is now generally received and adopted that contracts are to be construed and interpreted according to the laws of the state in which they are made, unless from their tenor it is perceived that they were entered into with a view to the laws of some other state" (*Potter's Dwar. on Stats.*, 361; and *Sedgwick on Statutory and Constitutional Law*, is to the same effect, 69-71).

For that reason, although the statute declares the marriage of the guilty party whose former marriage has been dissolved by a decree of divorce void, its effect should be limited to the case of marriage solemnized in this state. The purpose

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of the law was to restrain the performance of the act within this state, and not to affect the conduct of its citizens when they might be in other states and under, as well as subject to, different laws. To a certain extent it is true, that this construction must impair the force of the provision contained in the statute, because it allows the prohibition to be lawfully evaded; but that results from the circumstance that by the laws of the place where the act may be performed it is lawful and valid; and no law has been enacted prohibiting citizens of this state from availing themselves of the privileges conferred by such laws while they may be within the state maintaining them. All that this state has done is to prohibit and declare the marriage void, and that is necessarily restricted to acts performed within the territory under its authority. Beyond that, its citizens are not subject to its restraints, because they are not expressly made so, and their acts are governed by the general principle of law sustaining, everywhere, contracts that may be lawful and valid in the place where they are entered into, with the limitation that no state will carry into effect any agreement contravening its own code of morals.

This principle has repeatedly been applied to marriages unlawful in the state or country where they have been brought in controversy, but solemnized where the laws imposed no such disability on either of the parties. The general rule is stated by chancellor KENT in the following words: "As the law of marriage is a part of the *jus gentium*, the general rule undoubtedly is, that a marriage valid or void by the law of the place where it is celebrated is valid or void everywhere" (*Kent's Com.*, 7th ed., vol. 2, 59). And he refers to a very early case, decided by the spiritual court in England, sustaining that statement of the law. This decision is stated to have been gravely questioned; but it is added that the settled law is now understood to be that which was decided by the spiritual courts; and that principle is, "that in respect to marriage, the *lex loci contractus* prevails over

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the *lex domicilii* as being the safer rule, and one dictated by just and enlightened views of international jurisprudence" (*Id.*, 30). "It is a part of the *jus gentium* of christian Europe, and infinite mischief and confusion would ensue with respect to legitimacy, succession and other rights, if the validity of the marriage contract was not tested by the laws of the country where it was made" (*Id.*, 61). The same principle is maintained by Story, in his work on the Conflict of Laws (*secs.* 89, 113, 114, 123, *a, b*).

In Massachusetts, the validity of marriages solemnized in other states by its own inhabitants under circumstances prohibited by its own laws, has been made the subject of repeated litigation, and until the laws were changed by the legislature expressly preventing it from being done, always resulting in maintaining the binding effect of such marriages. It is true that the statutes under which the early cases arose, differed from that of this state in the omission to declare such marriages void. But that circumstance was not deemed by the courts of any practical importance. For the simple prohibition was held sufficient to render the marriage void in case it had been solemnized in the state of Massachusetts. On this subject PARKER, C. J., in delivering the opinion of the court in the earliest leading case, said: "By the law in force here when the marriage in question took place, that marriage could have no legal effect if it had been celebrated within this, then, province, because expressly prohibited by law. And although not by the provincial act declared void, yet it was necessarily so, in order to give effect to the law" (*Needway agt. Needham*, 16 *Mass.*, 157, 159). This was the case of a marriage between a mulatto and a white woman residing in Massachusetts, where such a marriage was prohibited, but valid in Rhode Island, where the parties had it solemnized; and it is apparent from it that in its decision the same effect was given to the provincial statute as it would have had if such a marriage had been actually declared void. In the succeeding case of *West Cambridge agt. Lex-*

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ington (1 *Pick.*, 505), which in its circumstances was like the case now before the court, the marriage was held valid on the same understanding of the effect of a statute simply prohibiting it. The same chief justice, in his opinion, said: "We think it very clear that, by the laws of this commonwealth, the marriage of the guilty party, after a divorce *a vinculo*, if contracted within this state, would be unlawful and void" (*Id.*, 508). But with that understanding of the effect of the statute prohibiting it, the court held the marriage valid, because it had been solemnized in another state which had enacted no such prohibition; and in *Dickson* agt. *Dickson* (1 *Yerg.*, 110), the supreme court of Tennessee held the same thing. CATRON, J., in delivering the opinion, said: "Had Mary married a second time in Kentucky, such second marriage would not be void because she continued the wife of Benjamin May, but because such second marriage in that state would have been in violation of a highly penal law against bigamy; and it being a well settled principle of law that any contract which violates the penal laws of the country where made shall be void." But notwithstanding that, as the parties were married in Tennessee, the marriage was held to be a lawful one. It is clear, therefore, that no well founded distinction exists between the laws of this state and those referred to in Massachusetts, which would have warranted the decisions there made and at the same time sanction a different conclusion in the courts of this state.

The principle that the validity of marriage must depend upon the laws of the place in which it may be solemnized, was further maintained in *Putnam* agt. *Putnam* (8 *Pick.*, 433), where the guilty party to a divorce decreed in Massachusetts, was afterward married in Connecticut. *Sutton* agt. *Warren* (10 *Met.*, 451) and *Clark* agt. *Clark* (8 *Cush.*, 385) sustained the same view of the law. The case of *Commonwealth* agt. *Hunt* (4 *Cush.*, 49) arose after the statute had been changed so as to declare the subsequent marriage void; but that circumstance was not of itself considered of suffi-

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cient importance to change the principle. The section making the change, provided that, "in cases of divorce from the bond of matrimony, the innocent party may marry again, as if the other party were dead. Any marriage contracted by the guilty party during the life of the other party, except as provided in the following section, shall be void, and such party shall be adjudged guilty of polygamy." The succeeding section included only cases where the court might give the guilty party leave to marry again. DEWEY, J., in the case last referred to, commenting upon the section just quoted, held that it, in terms, only forbid the guilty party from marrying in that state, and that the adjudicated cases fully sustained the validity of the marriage then before the court if it had taken place prior to the enactment of a succeeding statute prohibiting parties from marrying in another state, to evade the laws of Massachusetts.

- That provided that "when persons resident in this state [Massachusetts], in order to evade the preceding provisions, and with an intention of returning to reside in this state, go into another state or country, and there have their marriage solemnized, and afterward return and reside here, the marriage shall be deemed void in this state." After that enactment it could not be otherwise than that the preceding current of authorities should no longer have the force of law in that state; but they are still entitled to weight and consideration in this state, where no such enactment has been made; and the enactment itself is evidence that the legislature understood the marriages referred to as being valid without it, notwithstanding the provision generally declaring all marriages void to which the guilty party in a decree of divorce might be a party.

The validity of such a marriage when solemnized in a state different from that simply prohibiting it, was also sustained in *Fuller* agt. *Fuller* (40 *Alabama*, 301, 303, 304), and in *Simonin* agt. *Mallack* (3 *Swab. & Trist.*, 67), a marriage solemnized in England between French subjects was held law-

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ful, although the French courts had pronounced it void, for having been entered into in contravention of the laws of that empire. This decision was made before *Wood* agt. *Wood* was disposed of, and, though considered was not disapproved in that case.

In *Ponsford* agt. *Johnson* (2 *Blatchf.*, 51) the question was presented to the United States circuit court, held by judges NELSON and BETTS, whether a marriage solemnized in New Jersey between inhabitants of this state, was valid when one of the parties was the guilty party in a preceding decree of divorce. That brought up the precise point now under consideration; and the marriage was held lawful. And the court added, further, that the ruling would have been the same even if the parties had both left this state to evade the restraint imposed upon one of them by its laws.

The case of *Brooks* agt. *Brooks* (9 *House of Lords Cases*, 192) constitutes no exception to the principle now maintained. The marriage there was solemnized in Denmark, between British subjects; and it was held void because opposed to the ecclesiastical polity of that kingdom. It was between the former husband and surviving sister of a deceased wife — parties prohibited from intermarrying by the laws of England, and therefore within the exception already mentioned by which polygamous and incestuous marriages will not be sanctioned, even though solemnized in countries whose laws permit them. Lord CAMPBELL, who delivered one of the leading opinions in the case, said that: "It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of the domicile, if the contract is forbidden by the law of the place of the domicile as contrary to religion or morality or to any of its fundamental institutions" (*Id.*, 212). And the decision in that case will be found to have proceeded upon this ground, without affecting the stability of the principle from which the marriage of this case derives its support. In that respect

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it stands upon the same legal principle as *Hyde agt. Hyde* (1 *Probate and Divorce Cases*, 180); *Wightman agt. Wightman* (4 *John. Chy.*, 343), and which was mentioned in the decision of *Sutton agt. Warren* (10 *Met.*, 452). Where the marriage was solemnized between the plaintiff and defendant no legal disability appears to have stood in its way. It must, therefore, be assumed to have been then lawful and binding on the parties. And all the duties and obligations of that relation followed its solemnization. The law of this state did not extend there, and it did not prohibit them from going there for that purpose; and it follows that when they returned here that relation accompanied them with all its duties and obligations.

The plaintiff was clearly in contempt for marrying in violation of the decree to which he was a party; and if he were applying for relief in that action his disobedience would constitute an answer to his application (*Garstin agt. Garstin*, 4 *Swab. & Trist.*, 73, 75; *Cavendish agt. Cavendish*, 15 *Weekly Reporter*, 182); but no case has been found holding that because a party is in contempt in one action he shall not be at liberty to commence and prosecute another, for that reason, in no way connected with the one in which the contempt was committed. Such a principle would close the doors of a court of equity to all applications for redress, by a party in contempt, of every name, nature and character. So comprehensive a result has not yet been declared, nor intimated, as a lawful consequence following a party's disobedience of the orders and decrees of courts of equity.

The plaintiff's marriage was valid, as already shown, and the defendant as well as himself, was bound to observe its obligations. If she has so far failed as to entitle him to have the marriage dissolved under the laws of the state, he cannot be deprived of that right because he disobeyed a preceding decree to which she was not a party.

The statute has prescribed the causes for which such an action may be maintained, and declared the reasons for which

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a divorce may be denied after the defendant's infidelity has been established; and the objection that the plaintiff is in contempt in some other case to which the defendant is in no way a party is not among them. This is a statutory remedy, which the plaintiff is entitled to upon making a case within the statute; and as it contains nothing rendering the remedy dependent upon the conduct of the applicant in some other litigation, this court can subject the proceedings to no such qualification.

The general rule upon this subject has been declared in the following terms: "It is to be observed, however, that the rule that a party cannot move till^o he has cleared his contempt, is confined to proceedings in the same cause; and that a party in contempt for non-obedience to an order in one cause will not be thereby prevented from making application to the court in another cause relating^o to a distinct matter, although the parties to such other cause may be the same; and this privilege has been carried to the extent of allowing a defendant in each of two creditors' suits to administer the same estate, to move in one of them, in which he was not in contempt, to stay proceedings in the other, in which he was (1 *Daniell's Chancery Practice* [4th Am. ed.], 505; *Clark* agt. *Dew*, 1 *Russ. & Mylne*, 103; *Taylor* agt. *Taylor*, 1 *Macnaghten & Golden*, 397; *Turner* agt. *Doigan*, 12 *Simons*, 504).

The order should be reversed, and an order entered awarding issues as moved for by the plaintiff.

McLain agt. Van Zandt.

NEW YORK SUPERIOR COURT.

MARY McLAIN, an Infant, &c., agt. THOMAS VAN ZANDT.

Contributory negligence by a parent which prevents recovery for an injury to his child.

It is not the policy of the law to award damages where there has been any relaxation of parental duties and obligations toward a feeble or unprotected child, that may tend to encourage or induce neglect — still less when a parent by a direct act, exposes a child at a helpless or tender age to suffer injury, does the law favor the recovery of damages for an injury thus caused. •

*Special Term, November, 1874.**John T. Williams, for plaintiff.**John Sherwood, for defendant*

CURTIS, J.—The action is to recover damages for injuries sustained by falling into an unprotected area on defendant's premises. The father, who lived next door, and had a constant opportunity of seeing the area, sent the plaintiff, an infant three years and eight months old, across the street unattended, telling her to go to her mother. He testifies: "Away she went, and I watched her to see whether she would go in; and just as she went there she lifted her foot to go up—there is only one step to the door—as she lifted her foot to go up that step she fell into the areaway."

There was no dispute as to these facts, and the judge dismissed the complaint at the trial. This can only be sustained on the ground that there was negligence on the part of the father, which contributed to the plaintiff's injury

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The child was of such tender years that it was incapable of self-protection, and could not be responsible for its own acts, and, by a law of nature, relies upon its parents for guidance and protection.

I am inclined to think that it was the duty of the father, who was familiar with the locality and the risk the child was exposed to in crossing the street and ascending the step, to have accompanied the child instead of standing at a distance and watching it to see whether she would go in. This very act shows that he felt a doubt as to its capacity to perform the brief journey, and it was reasonable that he should feel so.

It is not the policy of the law to award damages where there has been any relaxation of parental duties and obligations toward a feeble or unprotected child, that may tend to encourage or induce neglect—still less when a parent, by a direct act, exposes a child at a helpless and tender age to suffer injury, does the law favor the recovery of damages for an injury thus caused.

This case seems to be one where there was negligence on the part of the father, which contributed to the plaintiff's injury, and where no question of fact existed to be submitted to the jury. The judge at the trial properly granted the motion to dismiss the complaint (*Mangan agt. Brooklyn R. R.*, 38 *N. Y.*, 458; *Bulger agt. The Albany R. R.*, 42 *N. Y.*, 462).

The motion for a new trial must be denied.

Fellows agt. Muller.

N. Y. SUPERIOR COURT.

JEROME B. FELLOWS agt. CATHARINE MULLER and another.

Answer stricken out as false and sham.

An answer containing a general or specific denial of each material allegation of the complaint controverted, duly verified, cannot be stricken out as sham.

Although the language of section 152 of the Code states that "sham and irrelevant answers and defenses may be stricken out," a general or specific denial of material allegations of the complaint may not be so disposed of.

The admission by a defendant in his answer, of specific portions of a complaint, accompanied by a general denial of each and every other allegation, puts in issue such other allegations.

As the order appealed from strikes out the entire answer, which contained a denial of material allegations of the complaint, it was unauthorized.

General Term, October, 1874.

Present—VAN VORST and SPEIR, JJ.

Thomas Brennan, for appellant.

Hatch & Van Allen, for respondents.

By the Court—VAN VORST, J. — Under the former system of pleading, a plea of the general issue could not be stricken out as sham. The defendant had the right by such plea, to put in issue for trial, in the ordinary way in which issues of fact are tried, all the material allegations of the declaration. "Courts have never set aside the general issue" (*Brewster and Bostwick* agt. *Hall and others*, 6 Cow., 34; *Broome County Bk.* agt. *Lewis*, 18 Wend., 566). Under the Code

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the defendant's answer may contain a general or specific denial of each material allegation of the complaint controverted by him (*Code*, § 149).

And when an answer contains such a denial, and is verified in the manner prescribed by law, it cannot be stricken out as sham (*Winne* agt. *Sickles*, 9 *How. P. R.*, 217; *Wayland* agt. *Tyssen*, 45 *N. Y.*, 281; *Thompson* agt. *Erie R. R. Co.*, 45 *N. Y.*, 468).

But as special pleas under the former system might be stricken out as false and sham, so affirmative defenses in an answer, or an answer containing affirmative defenses without a general or specific denial of material allegations of the complaint, may be so treated under the Code on similar grounds (*Stewart and others* agt. *Hotchkiss*, 2 *Conven.*, 634; *Brewster* agt. *Hall*, *supra*; *Code*, § 152).

But so reluctant was the court to strike out a plea setting up new matter by way of a defense, or special plea when properly pleaded, that it would be allowed to stand upon a very slight suggestion of its truth (*Stewart* agt. *Hotchkiss*, *supra*).

Although the language of section 152 states that "sham and irrelevant answers and defenses may be stricken out," a general or specific denial of material allegations of the complaint may not be so disposed of.

The answer of the defendant, which was stricken out by the judge at special term as false and sham, concludes by stating, "that except as hereinbefore admitted or denied, this defendant has no knowledge or information sufficient to form a belief as to whether or not the matters set forth in said complaint are true; and she therefore denies the same, and each and every allegation thereof, and she demands that the complaint may be dismissed." In the commencement of the answer the defendant admits the execution by her of the bond and mortgage sought to be foreclosed.

There is no other clear and unqualified admission in the answer.

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The admission of the execution of the bond and mortgage concedes that the same, with all its terms and conditions, is properly set forth in the complaint. But every other allegation is denied. While, therefore, the answer admits the allegation in the complaint "that in and by said mortgage it was provided that in case the party of the second part (the mortgagee) should effect insurance on said premises, the premiums should be due and secured by said mortgage" it must be held to deny the allegation in the complaint that "such insurance was effected by said plaintiff" and paid for by him. This is a material allegation of the complaint, and is accompanied by a claim on the plaintiff's part that in addition to the principal sum and interest, secured by the mortgage, the premium for insurance is due thereon. Under such an issue the plaintiff on the trial would be obliged to prove the payment by himself of such insurance premiums.

With such a material issue formed, it is unnecessary to inquire whether or not other issues are not raised by the defendants' denial, such as the assignment of the bond and mortgage to the plaintiff as alleged in the complaint, and which is claimed to be indirectly admitted, and whether or not the allegation of the defendants' default, by which plaintiff claims the whole amount of the mortgage to be due presently, is not also put in issue.

The admission by a defendant in his answer, of specific portions of a complaint, accompanied by a general denial of each and every other allegation, puts in issue such other allegations (*Allis agt. Leonard*, 46 *N. Y.*, 688).

We are, however, satisfied that the affirmative defense set up in the answer, of the payment of the interest on the bond and mortgage, is false, and that that defense could have been stricken out on the motion as sham. The answer does not allege that this interest was paid to the plaintiff, nor does it state to whom or where paid. The affidavits used on the motion show conclusively, that the interest has not been paid, but that the money for such payment has been placed by the

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defendant in the hands of her counsel, who argues this appeal, and that he still holds the same unapplied to such purpose. And that the receipt which defendant claims to hold for the payment of such interest, is signed by her own counsel, acknowledging the receipt *by him* of such moneys for such purpose.

This defense is clearly sham, and should not be allowed to stand. The affidavits used on the motion on the defendants' behalf, clearly show that these moneys have never been paid to the mortgagee or plaintiff, or any claimant whomsoever.

The order appealed from strikes out the entire answer. As it contained a denial of material allegations of the complaint, this, under the authorities above cited, could not be done.

But as the notice of motion, on the plaintiff's part, asked not only for the relief granted, but also for such other or further order as might be just, and as the defendant appeals from each and every part of the order, we can upon this appeal make such order as should have been granted by the judge below, upon the pleadings and affidavits.

The order appealed from should be so far modified as to strike out the second defense in the answer as sham, and that except as so modified the order appealed from be reversed and that neither party have costs of the appeal as against the other.

Morgan agt. Holladay.

N. Y. SUPERIOR COURT.

JAMES MORGAN agt. BEN HOLLADAY.

Sheriff's sale of personal property set aside for irregularity.

The court has the power to entertain a motion to set aside a sale by a sheriff of personal property under an execution.

Where the sale, as conducted by the sheriff, is in violation of the statute — First, that a large portion of the property was not present and within the view of those attending the sale; and, Second, it was not sold in lots and parcels — it will be set aside and the sheriff directed to restore the bid to the purchaser.

Special Term, August, 1874.

MOTION to set aside a sale of personal property sold under an execution.

Judgment having been entered in favor of the plaintiff against the defendant, an appeal was taken thereupon to the general term.

An undertaking on the part of the defendant, under section 335 of the Code, was duly filed, but there was no undertaking given under section 334.

As it was claimed that the undertaking filed was insufficient to stay execution upon the judgment, an execution was put into the sheriff's hands, under which he sold the right, title and interest of the defendant in a large amount of household furniture, which was held under a lease for two years by one Jaffray.

The sum bid was \$850, and the value of the property about \$30,000. The purchase, however, was subject to the right of possession in Jaffray for about two years.

The sheriff sold the property in one parcel, and it was alleged that only a small portion of it was in view of the bidders.

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J. Sessions & J. Larocque, for the motion.

A. Thain & A. W. Gleeson, opposed.

MONELL, *Ch. J.* — From an examination of the question which presented itself to me on the argument of the motion, I am satisfied that the court has the power to entertain a motion to set aside a sale by a sheriff of personal property under an execution. The power was and is constantly exercised by courts of equity, to avoid sales of real property (1 *Barb. Ch. Pr.*, 538; *Kellogg* agt. *Howell*, 62 *Barb. R.*, 280); and in some reported cases it has been exercised by courts of law to avoid sales of personal property (1 *Burill Pr.*, 300; *Bixby* agt. *Mead*, 18 *Wend. R.*, 611). The power is recognized in the following cases: *Davis* agt. *Tiffany* (1 *Hill*, 642); *Ames* agt. *Lockwood* (13 *How. Pr. R.*, 555); *Richards* agt. *Varnum* (8 *id.*, 79). In all the cases in which the motion has been denied, it was in the exercise of the discretion of the court and not for the want of power (*Meyers* agt. *Kelsey*, 19 *J. R.*, 197; *Adams* agt. *Elliott*, 1 *How. Pr. R.*, 220). When there are sufficient grounds, therefore, and it does not appear that any substantial right will be prejudiced by a summary examination, a motion is a proper proceeding.

In this case there has been only a mere technical payment of the bid, and the check given by the purchaser remains in the sheriff's hands. The sale, as conducted by the sheriff was, I think, a violation of the statute in two particulars:

First. A large portion of the property was not present and within the view of those attending the sale (2 *R. S.*, 367, § 23); and,

Second. It was not sold in lots and parcels (*Id.*).

The interest of the defendant was not that of a pledgor, and therefore the sale was not justified by section 20 of the same statute, under which the case of *Tift* agt. *Barton* (4 *Denio*, 171) was decided.

The sale should have been in such lots and parcels as was

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calculated to bring the highest price, subject to Jaffray's right of possession.

By the sale, the purchaser became the absolute owner of the property, subject only to its being used by the tenant for less than two years.

It is very clear that the manner of selling prevented competition, and grossly sacrificed the property.

The purchaser obtained property worth \$30,000 for \$850, and he now claims also to be entitled to the rent of it.

A sale such as this ought not to be allowed to stand.

The motion is granted setting aside the sale; the order must direct the sheriff to restore to the purchaser his bid.

An appeal having been taken from the above decision to the general term, that court, on the 2d November, 1874, affirmed the decision of the special term, FREEDMAN, J., delivering the opinion of the court, an abstract of which was published in the papers as follows:

Where, during defendant's absence, from the city on business, and during the pendency of his appeal to the general term, in consequence of the insufficiency of the undertaking given, defendant's interest as owner in \$30,000 worth of household furniture was sold on execution against him, subject to the use of his tenant for two years, and a large portion of the property was not present and within the view of those attending the sale, and the property was not sold in lots or parcels; and a client of plaintiff's attorney, under advice from said attorney, became the purchaser for \$850;

Held, 1. That, the interest of the defendant not being that of a pledgor, the sale of the property in one lot could not be justified under section 20 of 2 Revised Statutes, 367, but was irregular and void, and no title passed to the purchaser.

2. That, to prevent oppression, the court possessed inherent power over its judgment and process, and that an order made at special term, setting aside the sale and directing the sheriff to restore to the purchaser his bid, which was still in the hands of the sheriff, was proper.

Tugwell agt. Bussing.

SUPREME COURT.

MARY E. TUGWELL, Administratrix, agt. JOHN BUSSING,
Sheriff.

When sheriff is bound to sell personal property in parcels.

Where a sheriff levies upon various articles of personal property belonging to a copartnership firm, or an individual member, he is bound to sell it in parcels.

Second Department, September Term, 1874.

Present — BARNARD, P. J., TALCOTT and TAPPEN, JJ.

APPEAL from a judgment entered at the Westchester circuit.

G. W. Rathbun & W. W. Mann, for appellants.

Close & Robertson, for respondents.

TALCOTT, J. — This action was either very loosely tried or the bill of exceptions is very loosely made up, so that it does not present the facts in a very intelligent form. The plaintiff had an execution against one George Shaeffer against whom, as an individual, there were some prior executions. There was also an execution in the sheriff's hands against Shaeffer and Boesen, and a levy was made upon the property of the firm. The action seems to be brought against the sheriff for selling the property altogether instead of in parcels, by reason of which the plaintiff claims that her intestate lost the amount

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of his execution. It is not clear whether the sale was made first on the execution against Shaeffer or on that against the firm of Shaeffer and Boesen.

From the testimony of the only witness who gives any account of the particulars of the sale, it would seem that a sale was commenced on the execution against Shaeffer individually, then that was, to use the expression of the witness, "dropped," and a sale was made on the execution against Shaeffer and Boesen, to whom the property levied on belonged, and the entire property levied upon was struck off and sold to one Jones for a sum less than the amount of the execution against Shaeffer and Boesen.

After this sale was completed, the sheriff proceeded to sell the interest of George Shaeffer in the same property, and it was sold to the same Jones for \$325. If this is a correct statement of the facts, it is not apparent what interest of Shaeffer could have remained to be sold after the sale of the entire property on the execution against Shaeffer and Boesen.

The judge at circuit, although he directed a verdict for the defendant in the case, still left it to the jury to find by their verdict the amount of the individual interest of George Shaeffer in the property in order that the special or general term or the appellate court might give judgment final in the case and thus avoid another trial at the circuit.

In this course the counsel on both sides seem to have acquiesced, and we must understand the case as presenting the fact that the individual interest of George Shaeffer in the personal property amounted to more than enough to satisfy the Tugwell execution after the payment of all previous charges.

The question which the counsel for the respective parties seem desirous of presenting is, whether the sheriff was bound to sell in parcels. We see no reason to doubt but that he was.

The coal, for instance, which purchasers were at the sale prepared to bid upon. The defendant's counsel claims in his points that there were two chattel mortgages given by Shaeffer and Boesen. If this were true, it would present a different

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question as to the duty of the sheriff to sell in parcels (4 *Denio*, 171; 28 *How.*, 12). But so far as the case shows, there was only one chattel mortgage proved, namely, that to the Globe Life Insurance Company, which does not, on the face of it, purport to cover all of the property sold.

In regard to this chattel mortgage, the case represents the court as refusing to hold that it was not a lien on the property embraced in it, and in another part of the case, when defendant's counsel suggested that the \$24,000 shown by that instrument to be due from Shaeffer and Boesen to the Globe Insurance Company, should be taken into account as a debt due from the firm in the attempt to arrive at the value of Shaeffer's individual interest, and when the counsel for the plaintiff requested the court to rule that the sheriff was bound to sell the property not covered by the chattel mortgages separately from that which was so covered, the court is represented as answering both propositions by holding "that the chattel mortgage was no lien whatever on the property." And the court, in its instructions to the jury on the subject of the value of the individual interest of Shaeffer in the partnership property, omitted the amount of the chattel mortgage from the statement of the debts to be satisfied out of the property before the execution of the plaintiff could be reached. For what reason the chattel mortgage was held to be no lien and apparently no evidence of indebtedness on the part of Shaeffer and Boesen, does not appear in the case.

The defendant excepted to the ruling, but the error, if any, cannot be corrected on the plaintiff's appeal.

No ground is stated upon which a general verdict was ordered for the defendant, and it is quite manifest, from the case, that many things were, on the trial, assumed to be understood, which are not clearly stated in the case. On the whole, we are not at all satisfied that we should be doing justice between the parties by undertaking to render a final judgment in the case as presented. We think a new trial the much safer course.

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Judgment reversed and new trial ordered, costs to abide the event.

BAERNARD, P. J., and TAPPEN, J., concurred.

NOTE.—This case appears to have been very loosely tried or the bill of exceptions was very loosely made up, so that it did not present the facts in a very intelligent form; no ground being stated upon which a general verdict was ordered for the defendant, &c., the court were not satisfied they would be doing justice between the parties by undertaking to render a final judgment in the case as presented — ordered a new trial, costs to abide the event. But the point that the sheriff was bound to sell the property in parcels as mentioned in the *head note* was decided absolutely, and agrees with the case of *Morgan agt. Holladay* (*ante*, page 86).

It seems almost incredible, but there are but three reported decisions on this point, the two above mentioned, and *Sheldon agt. Soper* (14 *John.*, 352). — [REP.]

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SUPREME COURT.

GEORGE S. THOMPSON, appellant, agt. JAMES C. FARGO,
Treasurer, &c., respondent.

*Discharges from military service, when valid though names not on the
muster rolls.*

When from circumstances it is to be inferred that two discharges from military service are genuine and authentic; and if they are it is evidence that the persons named in them were in the United States military service and entitled to the money payable under them, although for some reason their names did not appear on the muster roll of the company.

First Department, General Term, October, 1874.

APPEAL from judgment recovered on referee's report.

Edward Van Ness, for appellant.

Hamilton Cole, for respondent.

DANIELS, J.—Upon the trial of this action the plaintiff produced a verified copy of the muster roll of Company H, Eleventh Regiment of Illinois Cavalry, from which it appeared that neither the name of John White nor William White appeared among the officers or men of that company. From that circumstance it was maintained, on behalf of the plaintiff, that neither of those persons belonged to the company, and that they were fictitious persons. But the discharge of each person was produced, purporting to be given by M. Campbell, as captain of the Eighth Iowa Infantry, com-

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manding the regiment; and, according to plaintiff's own evidence, he presented these discharges to the paymaster at Springfield when he received the amounts claimed by the Whites. And upon them, with the other papers used, the plaintiff received for them the money in dispute in this action.

From these circumstances it is to be inferred that the discharges produced were genuine and authentic. And if they were, then they are evidence that the Whites were in the United States military service, and entitled to the money in controversy, although for some reason their names do not appear on the muster roll of the company. There was sufficient before the referee to justify him in concluding that the Whites were real living individuals, and entitled, as against the plaintiff, to the money claimed in this action. And as that was the case, no such change was made in the evidence as distinguished the facts proved, or the rights of the plaintiff, from what they appeared to be when this action was previously before the courts for review. Accordingly the decision then made is conclusive against the plaintiff; and the judgment appealed from should be affirmed (*Thompson agt. Fargo*, 49 *N. Y.*, 188.)

DAVIS, P. J., and LAWRENCE, J., concurred.

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NEW YORK SUPERIOR COURT.

EDWIN LORD agt. WASHINGTON E. CONNOR.

What are referable actions.

In all cases arising on contract it must appear that the trial will require an examination of a long account in order to refer the action. The mere affidavit of the moving party that it will is not conclusive. The pleadings should also show this fact.

Special Term, August, 1874.

MONELL, Ch. J. — From an examination of the complaint in these actions, it seems that the action is to recover damages for the breach of an agreement, by the defendant, to purchase certain shares of Erie railway and other stocks, to replace other similar stocks which had been borrowed in the course of the dealings between the parties. As I understand the introductory allegations in the complaints, they are of facts intended to show that an agreement existed, by or under which the defendant was bound to purchase the stocks in question.

I do not understand that any of the purchases or sales mentioned in such introductory parts form any part of the claims for damages, but are intended to show the course of dealing between the parties from or by which it is claimed the agreement is made out.

In this view the actions are not referable (*Evans agt. Kalbfleisch*, 36 *Superior Ct. R.*, 450).

In all cases arising on contract it must appear that the trial will require the examination of a long account. The mere

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affidavit of the moving party that it will is not conclusive. (*Kane agt. Delano*, 11 *Abb.* [*N. S.*], 29).

I may be wrong in my construction of the complaints, and the actions may be to recover on the several purchases and sales stated therein. But that is by no means clear, and as the defendant, under section 158 of the Code, can compel a bill of particulars of the plaintiff's claims, in the several actions, I think he should so do, that it may be made clear what the cause of action is.

But, upon the papers before me, I must hold the actions not to be referable.

The orders of reference must be vacated, but without prejudice to a renewal of the motions upon additional papers.

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SUPREME COURT.

JAMES K. SPRATT, appellant, agt. GEORGE C. HUNTINGTON,
respondent.

Power to require one party to make an affidavit at the instance of the other party, to be used on the hearing of a motion.

Before the enactment of subdivision 7 of section 401 of the Code, the affidavit of a party could not be compulsorily procured by his adversary for the purpose of enabling the latter to use it upon a motion —

And subdivision 7 of section 401, does not modify nor repeal the precedent prohibition contained in section 389 of the Code, which declares that a party shall not be examined on behalf of the adverse party, except in the manner prescribed by chapter 6 of the Code, and that merely provides for his examination as a witness in the action.

No difficulty stands in the way of maintaining both provisions at the same time; and when that can be done, the latter statute does not repeal or supersede the earlier one relating to the same general subject-matter.

Where an order is made requiring the plaintiff to appear before a referee, at the instance of the defendant, to make an affidavit to be used on a motion, which the plaintiff refuses to do, and the defendant procures a further order that the plaintiff make such affidavit, and for his punishment in case of further disobedience, the plaintiff on moving to vacate the first order as irregular, is entitled to have his motion granted; and this necessarily vacates the second order, which is founded on the first.

General Term, New York, October, 1874.

AN order was procured by the defendant, without notice, requiring the plaintiff to appear before a referee, and make an affidavit to be used by the defendant upon a motion to be made by him in this action. He did not make the affidavit; and a further order was made on notice to him to appear and do so, and providing for his punishment in case of further disobedience on his part. The plaintiff then moved to vacate

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the first order, as irregular, and that motion was denied. From these two orders the plaintiff appealed to the general term.

H. Brewster, for appellant.

J. H. Whitelegge, for respondent.

DANIELS, *J.*—The fact that the plaintiff was nominally as well as actually in contempt for disobeying the order requiring him to appear before the referee and make his affidavit, did not prevent him from moving to vacate that order if in fact it was irregular. For if that was its character he was entitled as a matter of strict right to have it set aside. A party in contempt is not precluded from making such an application, but merely from applying for a favor resting to some extent at least in the discretion of the court (*Brinkley agt. Brinkley*, 47 *N. Y.*, 40).

And as the order requiring the plaintiff to appear before the referee and make his affidavit was made *ex parte*, the only mode in which he could be relieved from it was by a motion made to vacate or set it aside. He was directly affected by the order, and, if it was irregularly made, he had the right to have it set aside. The motion was properly made by him, and could have been made by no other person (*Ramsey agt. Gould*, 57 *Barb.*, 400, 410); and, as already shown, the order directing him to appear, made in the motion for his punishment, did not prevent him from making the application he did to vacate the first order. One of the appeals is from the order giving such direction; and that order is consequently under the entire control of this court, and for the purpose of determining the disposition which should be made of it, the question must first be considered whether the motion to vacate the order requiring the affidavit from the plaintiff was properly denied, and the solution of that question depends upon the existence of the power of the court to require one

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party to make an affidavit at the instance of the other party, to be used on the hearing of a motion.

In the case of *Cockey agt. Hurd* (36 *N. Y. Superior Court Reports*, 42), it was held that the court did possess that authority. This case was decided upon very full consideration, and being decided by the general term of a co-ordinate tribunal in this city, should be followed for the purpose of securing uniformity in the practice of the courts, unless it clearly appears to be erroneous. To a considerable extent its effect is impaired by the circumstance that two of the learned judges of that court have reached a different conclusion in carefully considered opinions — one of which was delivered since *Cockey agt. Hurd* was decided (*See Cockey agt. Hurd*, 12 *Abb. [N. S.]*, 308; *Knoeppel agt. Kings Co. Ins. Co.*, 47 *How.*, 412). The decision also receives some support from the case of *Fisk agt. Chicago & Rock Island R. R. Co.* (3 *Abb. [N. S.]*, 430). But it is exceedingly slight, because the point, though decided, was not to any extent made the subject of examination.

Before the enactment of subdivision 7 of section 401 of the Code, the affidavit of a party could not be compulsorily procured by his adversary for the purpose of enabling the latter to use it upon a motion (*Palmer agt. Adams*, 22 *How.*, 375); and the general term of the superior court of New York, in deciding *Cockey agt. Hurd* (*supra*), derived the authority exclusively from that subdivision; and it is substantially placed upon the ground, that it modified or repealed the precedent prohibition contained in section 389 of the Code.

A mere modification it could not very well be; for that section declares that a party shall not be examined on behalf of the adverse party, except in the manner prescribed by chapter 6 of the Code, and that merely provides for his examination as a witness in the action. If subdivision 7 of section 401 has had any effect on this prohibition, it has repealed it altogether. Nothing less than that could possibly

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be done, and, at the same time, provide for a different mode of examining a party. If, under subdivision 7 of section 401, a party can be so far examined before a referee as to be required to make an affidavit, at the instance and for the benefit of the adverse party, then a different mode has been provided for the examination of a party than that prescribed by chapter 6 of the Code; and the prohibition that it should not be done has certainly been repealed. But, if it has not been repealed, then subdivision 7 of section 401, should be so construed as not to include parties to the action.

The prohibition restricting the examination of one party at the instance of another to the mode prescribed by chapter 6 of the Code, has not been expressly changed or modified since 1848, when it was enacted; and that, certainly, is very cogent evidence that the legislature has at no time designed to effect any change in the restriction imposed by it. By the enactment of subdivision 7 of section 401, no indication was given of the existence of any legislative purpose to change it. All that was then done upon this subject was to declare that section 401 should be amended, by adding to it what is now subdivision 7 (*Laws of 1862, 858, sec. 32*). It simply provided for making an amendment, by way of an addition to one section, without indicating the existence of any purpose of changing any other section by doing that; and that it did not change the prohibition contained in the preceding section, 389, is well settled by the principle of construction restraining statutory repeals by implication.

The addition made by the amendment to section 401 was in no just sense repugnant to the prohibition contained in section 389. Both can very well stand together; and, where that can be done, no repeal by implication is effected by a later enactment.

By subdivision 7 of section 401, the affidavit of any person may be secured in favor of any party requiring it to make or oppose a motion, and, at the same time, parties can only be examined in the manner prescribed by chapter 6 of the Code.

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No difficulty stands in the way of maintaining both provisions at the same time; and when that can be done, the latter statute does not repeal or supersede the earlier one relating to the same general subject-matter.

The rule on this subject is, that the earliest statute "remains in force unless the two are manifestly inconsistent with and repugnant to each other; or unless in the latest act some express notice is taken of the former, plainly indicating an intention to abrogate it. As laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. Hence a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law, if the two acts will subsist together" (*Bowen agt. Sease*, 5 *Hill*, 221, 225, 226; *McCartee agt. Orphan Asylum*, 9 *Cowen*, 438; *Hayes agt. Symonds*, 9 *Barb.*, 360; *Van Rensselaer agt. Snyder*, *id.*, 303). This rule is more particularly applicable to an amendment of a system or scheme of laws relating to one general subject, like that of the Code of Procedure (*Powers agt. Shepard*, 48 *N. Y.*, 540); and under its application it is quite plain that the enactment of subdivision 7 as a mere amendment of section 401 — which is all that was done — did not repeal or modify the restriction imposed by the preceding section 389 of the Code.

It was so held in a carefully considered opinion in the case of *Hodgeson agt. Atlantic and P. R. R. Co.* (5 *Abb. [N. S.]*, 73), and for the reasons already stated, that authority should be followed instead of the decision finally made in *Cockey agt. Hurd* (*supra*).

The plaintiff was not bound to make an affidavit for the defendant, because he was a party to the action in which it was required, and his motion to vacate the order requiring him to appear before a referee to make it should have been granted.

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The order directing him to appear, which was made upon the hearing of both parties, and provided for proceedings by way of punishing the plaintiff for contempt if he failed to do so, is necessarily dependent on the order denying the plaintiff's motion to vacate the first order. If the latter is vacated the foundation is entirely removed, on which the second order stands. It follows, therefore, that the reversal of the order denying the plaintiff's motion requires the entire proceeding to be annulled. That should be reversed for the reasons already given, and, as a consequence of that, the order made for taking the plaintiff's affidavit must be vacated, and the other order made at the defendant's instance, and appealed from by the plaintiff, specially directing the plaintiff to make the affidavit, or, in default thereof, that he should be attached and brought before the court to be dealt with for his misconduct, should also be reversed. But from the confused condition into which the practice on this subject has fallen, the orders should be reversed, and the first order vacated, without costs to either party.

DAVIS, P. J., and LAWRENCE, J., concurred.

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SURROGATE'S COURT.

IN THE MATTER OF THE PROBATE OF THE LAST WILL AND TESTAMENT OF FREDERICK ROLLWAGEN, DECEASED.

*Petition by the wife of an heir at law to be made a party to proceedings to
contest the probate of a will.*

The wife of an heir at law upon petition showing that herself and husband had not lived together for a number of years; that ill feeling existed between them; that she gave him no cause for separation or desertion from her, and that her husband had not personally attended for the purpose of contesting the probate of his deceased father's will, who had recently died leaving a large estate; that there were good grounds of such contest, and asked permission, in her own behalf separately to oppose the admission of the will in order to protect her *inchoate right of dower* :

Held, that no case could be found, at least none reported, in which a wife's inchoate right of dower was determined as the sole ground of her right to apply for probate of a will under which her husband was a devisee or as the sole ground for permitting a contest of a will by her alone, in order to establish intestacy in case of no opposition to probate from her husband.

In this case, however, the husband with other sons of the deceased appeared by counsel and made a vigorous contest to the probate of the will.

City and County of New York, December 19th, 1873.

PETITION by the wife of an heir at law to be made a party to the proceedings to contest the last will and testament, and to be represented by counsel.

The petition set forth that the petitioner, Emily S. Rollwagen, was the wife of George D. Rollwagen, who was a son and one of the heirs at law of Frederick Rollwagen, deceased; that previous to the death of his father, about September

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11th, 1872, for reasons unknown to the petitioner, her husband left the city of New York and separated from her, hearing from him at very rare intervals; although since his departure she had borne a son to him, which lived about eight months, and died without seeing its father; that the father of her husband died about October 11th, 1873, seized and possessed of real estate, in the city of New York, of the value of about \$1,000,000 and leaving an alleged will which had been offered for probate, and proceedings had been instituted therein to contest the probate by some of the heirs.

The petition further set forth that she had not seen or heard from her husband since the death of his father, and that her husband had not attended personally before the surrogate's court when the will of his father was offered for probate, or at any proceedings connected therewith; that she was advised by her counsel and believed that said will was invalid and contrary to law in a very vital and essential particular; and in the event of refusal to probate said alleged will, she is entitled by law to an *inchoate* right of dower in the estate of her husband, as one of the heirs at law, and is, therefore, directly interested in opposing the probate of the alleged will, and having the same rejected by the court.

The petition prayed that she may be made a party to the proceedings, and may be represented by counsel in the surrogate's court; that her rights in the said estate may be properly taken charge of, and that an order may be entered accordingly.

The husband appeared in court and answered this petition by his affidavit objecting to having his wife brought in as a party contestant, or represented by counsel; that he had always been, and now was, represented by *Henry L. Clinton* and *George F. Langbein, Esqrs.*, his attorneys and counsel in the contest against said alleged will; that he proposed, as far as his wife was concerned, to attend to his own legal affairs, and denied the right, or the necessity for her to be a party, or to be represented by counsel in said contest. He then

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answered the petition by stating he had reasons for his departure from New York city, which was known to the petitioner; that he requested her to live with him in the home he should provide for her, and she declined to leave her parents' home; that upon his return to New York city he called upon his wife, but was not allowed to see her except in the presence of her mother; that while sick at his brother's house he sent for his wife, but her mother came with her; that subsequently he again asked his wife to live with him and she agreed to do so, provided he executed a paper agreeing to support her, to which he, of course, assented; thereupon, on December 1st, 1873, the wife brought two indentures in writing called "deeds, bargain and sale," in and by which, in consideration of one dollar, he was to convey to a third person, and the third person to the wife, one-third part of the real and personal estate, and, also, one-third part of the rents of the real and personal estate to which he might be entitled by the decease of his father, or by the alleged will, or otherwise; upon the husband refusing to sign these documents the wife said nothing else would do, and bade him good-bye forever.

The affidavit of the husband was fortified by the affidavit of his two brothers, each swearing they are contesting the will upon the law and the facts; and that every effort that could lawfully be made would be made to have the will and codicil declared invalid, and probate of the same refused.

Messrs. Adrianse & Wood & Ira Shafer, Esq., counsel for the petitioner, made and argued the following points: .

I. "Whenever a person comes forward to oppose the probate of a will, he is bound to state his interest in the question with a sufficient *certainly* to enable the court to decide, whether if the allegation is sustained by proof, it will support his claim" (*Norton agt. Watts*, 1 *Paige R.*, 348, 382, 883).

II. "Any person who has an interest in establishing the will, and who would be precluded if the decision was against

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its validity, has an unquestioned right to intervene, and thus make himself a party to the proceeding, if he is unwilling to trust the question of his rights to the party by whom such proceedings were instituted. * * * But in either case they must come in by petition in the proper form, and make themselves parties to the proceedings, before they can be permitted to take any part therein" (*Foster* agt. *Tyler*, 7 *Paige R.*, 48, 51, 52).

III. "A legatee under a will made prior to the one offered for probate, who is neither heir at law or next of kin of the deceased, may intervene to oppose the probate of the subsequent will" (*Terhune* agt. *Brookfield*, 5 *N. Y. Sur.* [1 *Red.*], 220).

IV. "The legatee has sufficient interest to entitle her to intervene to oppose the probate of the will offered. On proceedings for probate of a will, a claim of interest, positively sworn to, will make the claimant a contestant before the courts and a party to the proceedings" (*Norton* agt. *Lawrence*, 5 *N. Y. Sur.* [1 *Red.*], 473; *Dayton on Surrogates*, 159).

It was held in 8 *Barbour*, in the case of *Denton* agt. *Manning*, 618, "surplus moneys upon mortgage sales are in court for the use of defendants and such other persons as may be entitled thereto." Where a wife joins a husband in executing a mortgage upon his lands which contains the usual power of sale, and in the event of a sale the surplus is expressly reserved to be paid to the mortgagors, the wife has a right to have the residuum of the subject mortgaged, not required to satisfy the mortgage debt, whether it exists in lands unsold, or in the proceeds of land sold under the decree of foreclosure, so appropriated as to secure her her dower in case she survives her husband."

"And where there are surplus moneys in court arising from the sale of the mortgaged premises, she is entitled as against judgment creditors to have one-third of the amount invested for her benefit, and kept invested during the joint lives of herself and her husband and during her own life, in case of

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her surviving her husband as and for her dower in such surplus moneys."

In *Varties* agt. *Underwood* (18 Barb., 561), it was held that "The wife's inchoate right of dower in the husband's lands follows the surplus moneys raised by a sale in virtue of the power of sale, in a mortgage executed by her with her husband, and will be protected against claims of the husband's creditors, by directing one-third of such surplus moneys to be invested, and the interest only to be paid to the creditors during the joint lives of husband and wife." And see *Matthew* agt. *Duryea* (4 Keyes, 525).

Messrs. George F. Langbein, proctor for George D. Rollwagen and Frederick Rollwagen, Jr.; *William H. Newschaffer*, proctor for Louis P. Rollwagen, and *Henry L. Hilton, Esq.*, of counsel, made and argued the following:

I. That, in the case of *Norton* agt. *Watts* (1 Paige, 347) cited by petitioner, it was held that a person who opposes the probate of a will must make it appear that he is a party in interest, within the meaning of the law; that Norton, who claimed to have an interest in point of law, had none, and was not entitled to be heard. The chancellor, at page 383, says: "But in looking into the testimony as to the interest of Norton, there is no pretense that he is the next of kin to John L. Leake. He was his relation by affinity, but not by consanguinity." * * * "It must also be declared that the decedent died intestate; that John L. Norton, the appellant, is not his next of kin, is not interested in his personal estate, and is not entitled to administration."

In the case of *Foster* agt. *Tyler* (7 Paige, 48), cited by petitioner, it was held that a party in interest who claims to come in as an intervener, either in the court below or in the appellate court, must apply by petition to be made a party to the proceedings before he can be permitted to take a part therein. In this case it was held that the husband, whose wives were next of kin, had no standing in court. The chan-

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cellor, page 52, says: "The appeal in this case is by the husbands of two of the daughters of the testator, in their own names only as appellants, and not by them, and their wives in the right of the latter." * * * "And if the husbands are to be considered as parties to the appeal, they were only such parties in right of their wives, as two of the next of kin of the testator. Their wives, therefore, should have been joined with them as appellants in this court, in order to represent the same interests here."

This decision was rendered in 1838; at that time husbands were entitled, during their lives, to all the personal property of their wives, and to the rents, issues and profits of their real estate, yet it was held that they could not appear as parties on their own account, or in any other way than as joint with their wives."

II. That the wife had no vested right until the death of the husband, and that she had no *present* interest whatsoever.

III. That the husband was represented, and if she had any interest it was through the husband, and as he was represented, she was represented.

IV. That the surrogate had no discretion in the matter; that it was a most dangerous precedent; that to allow the petition would entitle the grandchildren to claim representation, and the wives, respectively, of all male heirs, or of any male having any present legal interest in the estate; it would throw doors open to all possible collateral issues, and there would be no stopping point.

Malcolm Campbell, Esq., proctor for the seven grandchildren of the decedent, named Browning, contended that, in the supreme court, the wife could not be a party without the dower having vested in such a case; and that the surrogate had held, in the *McCunn will case*, that he had no power to let in collateral interests.

Arnoux, Ritch & Woodward, proctors for Magdalena Rollwagen, executrix, Henry Hermann and George Hermann,

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executors under the alleged will, *William Henry Arnoux, Esq.*, of counsel, argued :

I. That the surrogate had no discretion in the matter ; and if he had, the petition should not be granted.

II. That no objection to the will and codicil had yet been filed, and the husband could turn about and ask that the will be probated, and his wife could not prevent him, or it being done ; that if deceased had given \$100,000 in cash to the husband, and had \$500,000 in real estate at time of his death, and the husband was satisfied with the cash, the wife could not come and say she would only be satisfied with dower.

David R. Jacques, Esq., proctor for an infant child, *Magdalena Rollwagen*, "the younger," also protested against the granting of the petition.

ROBERT C. HUTCHINGS, *Surrogate*.—The wife of the heir at law of the decedent, applies to be made a party to the proceedings or for leave to intervene by her own separate counsel, to oppose the probate in question. Her petition is dated the twenty-second of November, and states that over a year ago, her husband, a son of the decedent, for reasons unknown to herself, left her and went to California, where, so far as she knew and believed, he had remained, and still was ; hearing from him very rarely, although she had, since his departure, given birth to a child to him, that lived only eight months, and whom the father had not ever seen ; and the petition refers to the existence of disagreement and ill feeling between herself and husband before he went away ; but denies that they were of such nature as to give him cause for separation or desertion.

On such grounds, with the further allegation that her husband had not personally attended for the purpose of contesting this probate, and that she is advised and believes that there are good grounds of contest ; she asks permission in her own behalf, separately to oppose the admission of the will, in order to protect her *inchoate right of dower*. It is

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not claimed by the petitioner's counsel that she is a *necessary* party to the proceedings; and it is only the discretionary power of the court that is invoked.

The statutes give no express right to any others to appear and contest the probate of a will, than the *heirs and next of kin* and *widow*, if one survives; for the reason that no others can be interested in defeating the probate, and they as being entitled to the estate, in case of *intestacy*. Yet persons, claiming as legatees under a will of earlier or later date, may intervene to contest; but it is because the statutes provide, that any *executor, devisee* or legatee named in a will, or any person interested in the estate may have such will proved, and the inquiry is *which* of the two instruments is the *last will*? The court, in that case, directs the proper application to be made, or other forms of proceedings, in order that there may be an effectual determination, as between the conflicting papers presented as the last will.

But the *persons interested* in the estate as proponents, other than *devisees* or *legatees*, should have a direct interest, such as creditors and the like. I think no case can be found, at least I have found none reported, in which a wife's *inchoate right of dower* was determined as the *sole* ground of her right to *apply* for probate of a will, under which her husband was a *devisee*, or as the *sole* ground for permitting a contest of a will by her alone, in order to establish intestacy in case of no opposition to probate from her husband.

Yet, if the application under *consideration* be granted, it appears to me that it would be a precedent that would require the allowance of that sort of contest and which would certainly appear at first, anomalous to every legal mind, if not evidently inadmissible. If the relief sought for is not sustainable, or demanded by a wise judicial discretion in that *extreme* case where the husband and all other heirs at law make *default*, and if the wife's petition so to contest is not a legal right, which is not claimed, how much less would such permission be required or justified where *other heirs* at

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law of the same degree of relationship to the testator as her husband, do contest by able and experienced counsel, and there is therefore no evidence that the contest is not already in safe hands, and no proof that any assistance of facts or other means, at petitioners command, tending to invalidate the testamentary will not or may not, be as available through the other contestants as if presented by her own counsel ?

But in this case it now, on the hearing of this application, appears that the husband of petitioner has returned from California, and is now in personal attendance, and is also represented by counsel who contest on his behalf, as well as for the other sons of the decedent ; and there is no evidence to satisfy me that the husband will not, in co-operation with the other sons, do all that is practicable, or that the alleged inchoate interest of petitioner in the right of her husband, will not be faithfully and properly protected.

Even, however, if the husband of petitioner had not appeared personally and by counsel to contest the probate, I should feel constrained to deny the leave asked as not required by a sound discretion under the circumstances of this case ; and I am not able, at present, to convince myself of the propriety of such intervention in any case, even where there is a *separation* of husband and wife, but without the sanction of a divorce or of some judicial act decreeing or allowing it, or the pending of legal proceedings for that purpose.

The mere fact that a woman is living apart from her husband does not entitle her in an action to answer separately (*Gray* agt. *Whittington*, 5 *Beavan*, 270 ; *Barry* agt. *Woodham*, 1 *Y. & Col.*, 538).

And even in cases where the wife is a necessary party in equity proceedings to foreclose a mortgage, it was held in *Lathrop* agt. *Heacock* (4 *Lansing R.*, p. 1, 1871), that in such a proceeding, affecting the husband's real property only, he was *authorized* and *required* to have an appearance entered for his wife upon service on him *alone* and *without* authority from her.

In that case the wife, after her widowhood, sued to redeem

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premises from sale under judgment of foreclosure, and the court held that she was barred; that the appearance in the foreclosure was regular, though she never authorized it; that the action did not concern her separate estate; that all the interest she then had was an inchoate right of dower; that it was the husband's *right* and his *duty* to employ an attorney to appear for her, and *she was bound by it*; that in law it was an appearance by her authority, to all intents and purposes, that the act of the husband in employing an attorney to appear for her in such a case, was her act; and so it had always been held (2 *John. Ch.*, 133; 11 *How. Pr. R.*, 42); that the service of the process upon the husband alone was in law a good service upon her; that they were one person in law, except as to her *separate* estate; that had the action concerned her separate estate, it would have been different, and that in such a case the husband had no right to appear for the wife. The reasoning of that case may be usefully applied to such a probate proceeding as this, on the question of a separate appearance.

Besides, it is obvious that the precedent, should the leave asked for be granted, would be a dangerous one, as tending to encourage contentious cases of probate; also to increase delays and expense, and might aggravate and bring uselessly before the probate tribunals, domestic discords and conflict, if husband and wife were thus represented by different counsel.

If the inchoate right of dower of a wife in her husband's real estate were a vested or separate estate in the land, the case would, of course, be essentially different, but her right in her husband's lifetime, as to his real estate, is too uncertain to be treated in any such important sense *separate*, as to be distinguishable from his interest as an heir at law, when he is duly cited to appear upon probate. The right of dower before the death of the husband, says a distinguished jurist, "is not only an inchoate right not transmissible to her heirs, nor during the life of her husband, can she give it any form of *property* to her advantage. So long as the husband shall live, it is only a right in legal contemplation, depending upon

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the good conduct of the wife and the death of the husband, and, like all rights which are contingent, may never become vested (*McLEAN, justice, Johnston agt. Van Dyke*, 6 *McLean Reports*, 422). Similar language is employed by the court in the case of *Moore agt. City of New York* (4 *Selden*, 110; 4 *Sandford Superior Court R.*, 456). It is there said that the inchoate interest of the wife is a right to a claim for dower, contingent upon her surviving her husband. Such a *possibility* may be released, but it is not, in any sense, an interest in real estate. It is not, of itself, property the value of which may be estimated, but an inchoate right, which, on the happening of certain events, may be consummated so as to entitle the widow to demand and receive a freehold estate in the lands.

From the uncertain and contingent character, therefore, of an inchoate right of dower, taken in connection with the facts referred to as showing that the interests of the petition are not in jeopardy, I deem it my duty to decline to exercise the discretion of permitting her to intervene as a contestant separately from her husband, especially in the absence of statutory provisions on the subject.

In England there is an express statutory enactment (*see* 61 *of the Court of Probate Act*, 1857) that, when proceedings are taken for proving a will in solemn form, revoking the probate of a will on account of its invalidity as to real estate, the heirs at law, devisees or other persons having or pretending to have an interest in the *realty* shall be cited or summoned *in like manner* as the next of kin, or other having or pretending to have an interest in the *personalty*, and may be permitted to become parties, or to intervene for their respective interests in such real estate, subject to the rules and orders under said act, and to the *discretion of the court*.

The question is a novel and interesting one; and, even if I have the power in my discretion to allow such a contest by the wife of an heir at law, separately from himself, in any case, the facts do not, in my judgment, warrant it in this; and the petition for leave so to appear, &c., is denied.

Dietz agt. Dietz.

SUPREME COURT.

HARRIET DIETZ, respondent, agt. JOHN G. DIETZ, appellant.

How issue of fact for divorce on the ground of adultery should be tried.

An issue of fact in an action for a divorce from a marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived or a reference be ordered by the consent of both parties.

First Department, General Term, October 30, 1874.

APPEAL from order denying defendant's motion for stay of proceedings.

Charles Jones, for appellant.

William H. Gale, for respondent.

DANIELS, J. — The defendant's motion for a perpetual stay of the plaintiff's proceedings was made upon the ground that, in a previous action brought by the defendant against her in the superior court, she was found guilty of adultery herself, and therefore not entitled to a divorce on account of the adultery of her husband. The fact of this preceding adjudication is alleged by way of defense by the defendant in his answer. And that will, when proven, entitle him to a judgment in his favor, unless the plaintiff can relieve herself from its effect by proof of some other fact. In her complaint she charges acts of adultery by the defendant, committed since the issue was joined in the preceding suit. And she may possibly be able to entitle herself to a judgment in her favor, if she can establish the truth of that charge, and give such other proof as may be required for that purpose. Whether there is any probability that she may succeed in her action, notwithstanding

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the decision against her in the other case, it is not now necessary to consider.

This is not the proper mode of determining that point. The law has provided and assigned a different course of proceeding for that purpose. The pleadings have resulted in a complete issue of fact, and the prescribed mode for trying that is not by way of special motion on petition and affidavit. That is by noticing and bringing the issue on for trial. The Code is explicit on this subject. Its provision is that "an issue of fact in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived or a reference be ordered (*sec. 253*); and a reference can only be ordered when the consent of both parties has been secured for it, where the action is brought for a divorce (*sec. 270 of Code*). No other mode for trying and determining the issues joined in an action for divorce has been prescribed or sanctioned by the provisions of the Code, regulating the mode in which civil actions are to be tried.

If the motion made by the defendant could prevail, every defense resting on a former adjudication could be tried by the court on special motion. That proceeding is only proper when an order is to be applied for; not when a judgment upon an issue of fact is what the nature of the case requires. If the application in this case could prevail, the principle sanctioning it could, with equal propriety, be so far extended as to include all defenses capable of being conclusively sustained by documentary proof.

The practice of the courts is against that mode of proceeding, and it has been rendered so by legislative action, prescribing the manner in which issues of fact are to be tried and disposed of.

The order appealed from was correct, and it should be affirmed with ten dollars costs and the plaintiff's disbursements on the present appeal.

DAVIS, P. J., and LAWRENCE, J., concurred.

In the Matter of Keteltas.

SUPREME COURT.

IN THE MATTER OF THE PETITION OF EUGENE KETELTAS
TO VACATE AN ASSESSMENT FOR CURB, GUTTER AND
FLAGGING.

Invalid proof to vacate an assessment.

Where the proof is entirely insufficient to establish the fact that a certain newspaper, to publish legal notices, was designated by the comptroller of the city of New York for a certain year, and that the assessment proceedings in a street matter took place during that year, it is irregular to order the assessment vacated.

General Term, First Department, October 18, 1874.

APPEAL from an order vacating assessment.

E. Delafield Smith, for appellant.

Neville & Andrews, for respondent.

DAVIS, P. J.—In this case also, the petitioner has failed to establish any interest in the lots which entitles him to maintain the proceedings. The reasons assigned in the opinion in *In re Phillips* are equally applicable to the present case.

There was also an utter failure to prove the alleged defect. It was shown that the New York Leader was designated by the comptroller as one of the papers to publish the proceedings of the common council, pursuant to the first section of chapter 586 of the Laws of 1867; but the designation was limited by its terms to the year 1867.

All the proceedings in this matter took place in 1868. The absence of notices, &c., in the New York Leader, in 1868, may quite as readily be accounted for, perhaps, by presuming

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the non-designation of that paper for the year 1868, as by the presumption that the officers of the city were guilty of a neglect of official duty. It is quite certain that no proof was given that the Leader was appointed for 1868, unless it is to be found or inferred from a certificate which, in terms, designated that paper "during the year 1867." And to treat the proof given as evidence of a fatal defect, it is necessary to presume a double neglect of duty on the part of public officers. First, that the comptroller neglected to make any designation for the year 1868; secondly, that the common council neglected to publish its proceedings in all the papers employed by the city.

Again, if the designation of the Leader for 1868 can be inferred, that alone was not sufficient proof that that paper, in fact, became one of those employed by the city. The proof given was only one step toward proving such employment, and, as the paper was not bound by the mere act of designation, there was a fatal insufficiency in the proof given.

I am of opinion, also, that, had the alleged defect in publication been proved, the seventh section of the act of 1872 (*Sess. Laws, 1872, chap. 580*) operates to prevent the vacating of the assessment on any such ground, and that this case is not within the exception contained in that section (*Lennon case, court of appeals, and matter of Antwerp, same court*).

The order appealed from should, therefore, be reversed, with ten dollars costs and disbursements, and the petition denied, with ten dollars costs of the court below.

BRADY, J., concurs.

DANIELS, J. — I concur, without deciding what the effect of the act of 1872 should have in the case.

Murphy agt. Keyes.

SUPREME COURT.

JOHN MURPHY and another, appellants, agt. JAMES F. KEYES,
impleaded, &c., respondent.

Stipulation to stay.

A stipulation to stay proceedings under a judgment until the appeal from the same should be determined is to be interpreted reasonably, and an order to set aside execution issued in violation of the terms of such stipulation should be affirmed.

General Term, October 30, 1874.

DANTELS, J. — No doubt can be entertained but that the reasonable import of the stipulation stayed the proceedings in this and the other cause pending in this court, upon an appeal being taken from the judgment recovered in the superior court. That appeal was taken, and from that time this and the other cause in this court were to abide its event. The tenor and effect of the stipulation was that all proceedings in these causes should remain suspended until that appeal should be determined. The order setting aside the executions issued in violation of the terms of the stipulation was right, and it should be affirmed, with ten dollars costs to the respondent and disbursements on the appeal.

DAVIS, P. J., and LAWRENCE, J., concurred.

Bishop agt. Empire Transportation Company

N. Y. SUPERIOR COURT.

JAMES BISHOP and others agt. THE EMPIRE TRANSPORTATION
COMPANY.*When shipper and others bound by the terms of a bill of lading.*

A shipper is bound by the terms of the bill of lading delivered to and accepted by him, at the time of the shipment of merchandise. Its terms become the contract of the parties.

Where the shipper, after receipt of bills of lading, passes them to a third person and receives a loan of money upon them, it is a good reason for the conclusion that the shipper fully approved of their terms.

And the party who makes the advances is also clearly bound by the terms of the bills. As much so as the purchaser of a bill of exchange is by the language of the draft he buys.

*Special Term, 1873.**Mr. Andrews, for plaintiffs.**Mr. Cadwalader, for defendants.*

VAN VORST, J. — A shipper is bound by the terms of the bill of lading delivered to and accepted by him at the time of the shipment of the merchandise.

Its terms become the contract of the parties.

By taking the bill, the shipper is presumed to know and agree to its contents, unless he dissents.

There might be circumstances, as that the paper was delivered to him at a time when he had no opportunity to examine its contents before the goods were put in motion for their place of destination, which might modify the rule above expressed (*Blossom* agt. *Dodd*, 43 N. Y., 264; *Belger* agt. *Dinsmore*, 51 N. Y., 166 [*Com. of Appeals*]).

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The former case shows that the receipt was delivered to the plaintiff in a dimly lighted car, and under circumstances unfavorable to an examination of its contents, the goods being in actual transit at the time, and immediately passing into the carrier's control, before examination could be made or dissent expressed.

In the case before me the bills of lading were not delivered until the following morning after the day the goods were delivered to the carrier, when the shipper called for the bills, as he had been accustomed to do, on previous occasions of shipment.

The bills received on previous occasions were in the same form as those in evidence in this action. From their terms no dissent had ever been made by the shipper.

When he called for the bills in question, on the next day, he would be presumed to have expected, and could have properly demanded that they should be in the accustomed form.

Under such circumstances, when received without dissent, the shipper would be concluded by the terms of the bills, and the carriage must be held to have been made in pursuance of the terms and conditions therein expressed.

But, in addition, the shipper signified his assent to the terms of the bills by passing the same to the plaintiffs and borrowing money thereon.

He did this, as he had on previous occasions, to obtain advances on the bills.

He had ample opportunity to examine the bills before accepting them, and could, had he been so minded, have expressed his consent to the shipment on their terms. His failure to express dissent, followed by his delivery of the bills to the plaintiffs, from whom he received advances thereon, are good reasons for the conclusion that he fully approved of their terms.

The plaintiffs, who made these advances, are also clearly bound by the terms of the bills. As much so as the pur-

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chaser of a bill of exchange is by the language of the draft he buys.

It is difficult to conceive of any good ground of doubt about a proposition apparently so clear.

There is no allegation or evidence of any fraud, surprise, or mistake on their part.

The bills provided that the carrier should have a lien on the oil, the subject of carriage, for previous indebtedness of the shipper, to the defendants, for freight.

This provision was also contained in previous bills, received without objection.

That the shipper did not actually read the bill is his own, not the carrier's fault. He is presumed to have known the contents and to have adopted them; and for the same reasons the plaintiffs are concluded.

Under the bills of lading, the defendants were justified in holding on the oil, although demanded by the plaintiffs, until their lien and claim for freight was discharged. Besides, the bills at the time of their presentment and the demand for the oil thereunder, were not indorsed by the shipper, which was required to be done,* by the terms, before the carrier could be held responsible thereunder.

The Pennsylvania statute referred to, contains nothing in opposition to the views herein expressed.

For these reasons the complaint should be dismissed with costs.

Jeffries agt. McKillop & Sprague Company.

SUPREME COURT.

NATHANIEL JEFFRIES and another, appellants, agt. THE
MCKILLOP & SPRAGUE COMPANY, respondents.

Irrelevant and redundant portions of answer — motion at special term discretionary — appeal to general term.

The recent decisions of the court of appeals in *Livermore* agt. *Bainbridge* (47 How., 354) and in *Grey* agt. *Flake* (53 N. Y., 630), have settled, definitely, that even in cases where the motion is addressed to the discretion of the justice at the special term, an appeal lies to the general term; and in such case, if the justice decides wrongly in the first instance, it is not only the right but the duty of the general term to correct his error.

An answer in an action for libel may contain matters both in justification and mitigation, and where they are applicable to either justification or mitigation, they are properly pleaded and cannot be stricken out as irrelevant or redundant.

General Term, First Department, October 30, 1874.

THIS is an appeal from an order denying a motion made on the part of the appellants, to strike out certain portions of the answer of the defendants (respondents) as irrelevant and redundant. The action is for a libel, alleged to have been maliciously composed and published, of and concerning the plaintiffs, by the defendants.

_____, for appellants.

_____, for respondents.

LAWRENCE, J. — The defendant is a corporation created and organized under the laws of the state of New York,

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whose business is that of printing and publishing books, pamphlets and newspapers relating to commercial credit, and the furnishing of information respecting the same. The plaintiffs were merchants, doing business in the city of Cincinnati, in the state of Ohio, at the time of the publication of the alleged libel. The portion of the answer which it is moved to strike out, alleges that the defendants, for the purposes of their business, have connected with them other commercial agencies, with whom, including the firm of Tappan, McKillop & Co., they have contracts that each shall furnish to the other, to enable them to carry out their contracts with their respective subscribers, information that either may need concerning the business and commercial standing of any person or firm within the territorial district, or elsewhere, within which either of the parties to the contract may carry on business. That such a contract existed between the defendants and the firm of Tappan, McKillop & Co., of the city of Cincinnati, prior to the 1st day of July, 1873 (the date of the alleged publication), which contract had ten years to run, from the 1st of July, 1870.

It is then averred that the words complained of were composed and telegraphed as a warning and for information to said firm, and in confidence, and for their business, and was not to be used in any other way. And also for the purpose of eliciting a reply from said firm that would give the defendants the information they required about the commercial standing and credit of the plaintiffs, in order that the defendants might place upon their books a true and correct account about the plaintiffs, and correct the rumor as to the embarrassments of the plaintiffs, if such rumors were untrue.

Also, that the plaintiffs were, at the time of the alleged publication, subscribers to the commercial agency of Tappan, McKillop & Co.

It is objected, on the part of the respondents, that the order in question rested within the discretion of the court,

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and that an appeal will not, therefore, lie to the general term. I think that the decisions of the court of appeals in the very recent cases of *Livermore agt. Bainbridge* (47 How., 354), and in *Grey agt. Fiske* (53 N. Y., 630), have settled definitely that even in cases where the motion is addressed to the discretion of the justice at the special term, an appeal lies to the general term; and that in such case, if the justice decides wrongly in the first instance, it is not only the right but the duty of the general term to correct his error.

But I am not satisfied that there was any error committed in the disposition which was made of this motion at the special term.

An answer is said to be irrelevant when the matter which it sets forth has no bearing on the question in dispute, does not affect the subject-matter of the controversy, and can in no way affect or alter the decision of the court (*Lee Bank agt. Kitching*, 11 Abb., 435; *Cahill agt. Palmer*, 17 Abb., 96; *Fahrcoth agt. Laumt*, 3 Sandf., 743).

The business in which the defendants were engaged was a lawful business, and communications made by them in good faith to their subscribers are held to be privileged communications (*Ormsby agt. Douglass*, 37 N. Y., 477).

The matter set forth in the complaint as libelous, consisted of a communication by the defendants to another mercantile agency, with which the defendants allege they had a contract, by which each was to supply the other any information that either might need, or that might be of use to either in their respective business, and to enable them to carry out their own and their respective contracts with their subscribers.

Without determining definitely whether such communications are, within the rule laid down in *Ormsby agt. Douglass* (37 N. Y., 477), privileged communications, I think that the defendants are entitled to allege in their answer the circumstances under which the alleged libelous matter was published, for the purpose of showing the nature and character of the publication; and that in that view it cannot be said

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that the matter contained in the allegation sought to be stricken out, have no bearing upon the question in dispute, or that they do not affect the subject in controversy.

In this view, the portion of the answer objected to cannot, therefore, be said to be irrelevant or redundant (*Cases, supra*).

Again, under the provisions of section 165 of the Code, a defendant is entitled to allege in his answer both the truth of the matter charged, as defamatory, and any mitigating circumstances.

The portion of the answer complained of is alleged, both by way of justification and mitigation. If not good as a justification it certainly contains matter proper to be taken into consideration in mitigation (*Bush agt. Prosser*, 11 *N. Y.*, 347; *Bribery agt. Shaw*, 12 *N. Y.*, 67).

And, if proper to be pleaded for any purpose, the matters contained in the allegation cannot be considered as irrelevant or redundant.

I am, therefore, in favor of affirming the order of the special term, with costs.

DAVIS, P. J., and DANIELS, J., concurred.

O'Connor agt. Shipman.

SUPREME COURT.

OWEN O'CONNOR, plaintiff, agt. CAROLINE H. SHIPMAN *et al.*,
defendants.

Effect of a mortgage authorizing whole sum to become due in case of non-payment of taxes.

In an action to foreclose a mortgage, which by its terms provides that in case the taxes upon the mortgaged premises should remain unpaid on the first of February in any year that the whole principal sum secured to be paid by the mortgage should become due, the court has no more power to relieve a party against such a default than it would have if the terms of the mortgage made the principal money due and payable on default of payment of the interest according to the condition of the mortgage.

Special Term, February, 1873.

VAN BRUNT, J. — This is an action to foreclose a mortgage. The mortgage provided that in case the taxes upon the mortgaged premises should remain unpaid on the first of February in any year, that the whole principal sum secured to be paid by the mortgage should become due.

The taxes for the years 1870 and 1871 remaining unpaid, this action was commenced to foreclose the mortgage.

The defendant, by his answer, avers that he made an arrangement with the son of the plaintiff, by which it was agreed that the payment of the taxes would not be insisted upon if he, the defendant, made certain improvements upon certain other property upon which the plaintiff had mortgages, and that, relying upon this promise, he made the improvements, and did not pay the taxes.

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The defendant Hamilton W. Shipman testified that he was the agent of his wife, the owner of the equity of redemption, and that in December, 1870, he had a conversation with the son of the plaintiff, and who had charge of his business, in which he asked him if he made certain improvements upon certain other buildings, if he might let the taxes on these buildings remain; and the son said yes, that will be all right; and that, relying upon that promise, he did not pay the taxes.

In April (19th, 1871), the son wrote to Shipman that the taxes were unpaid, and calling his attention to the clause of the mortgage; but still, Shipman did not pay the taxes then due, nor the taxes which fell due according to the terms of the mortgage, on February 1st, 1872.

It is claimed by the plaintiff that his son had no power to release any of the covenants of the mortgage, and had no power to do anything as an attorney except to collect the interest on the bonds as it might mature; and there was no evidence introduced before me to show that his agency extended any further. Even if it did, I think a correct construction of the agreement, as testified to by Shipman, would limit the waiver of the covenant in the mortgage to the taxes of 1870, because they seem to be the only taxes contemplated by the parties at the time of the conversation, and consequently would not excuse the default in the payment of the taxes of 1871.

It is claimed by the defendant that the plaintiff has been guilty of oppressive conduct in insisting upon his right to the whole of the money secured by the mortgage—the defendant having been misled by the conversation he had with the son—and, consequently, this court should relieve him. He certainly was not misled as to the taxes of 1871, because, as early as April, 1871, he was informed that the payment of the taxes would be insisted upon, and this suit was not commenced until nearly a year after—a sufficient time certainly to have enabled the defendant to have protected himself.

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It is admitted by the defendants that courts will not relieve the mortgagor from the operation of a condition in a mortgage that upon failure to pay any part of the principal or interest the entire principal shall become due. But it is said all the adjudicated cases relate exclusively to conditions of interest and principal.

I am unable to discover any difference between a condition relating to principal and interest and one relating to taxes. If it is expressly stated that the whole principal sum shall become due because of the non-payment of taxes, and taxes are unpaid, and the mortgagee commences his foreclosure on that account, I do not see how the court can relieve the defendant any more than they could for the non-payment of interest. It seems to me, therefore, that the plaintiff must have judgment of foreclosure and sale.

Holloway agt. Stevens.

SUPREME COURT.

THOMAS HOLLOWAY, respondent, agt. BENJAMIN F. STEVENS,
appellant.

Public policy — applicable to principal and agent.

Public policy, when it should be considered as the policy of the law, forbids an agent, by any underhand arrangement or device, from becoming the owner of his principal's property employed in or about the agency. Where an arrangement was made and carried into effect, without the knowledge of the principal, that the principal's property should be sold upon the execution issued in favor of the defendant and purchased by the agent, and the proceeds, after payment of the sheriff's fees, which were fixed at the exorbitant sum of \$200, paid over to the defendant, and that no restitution of it should be made in case of a reversal of the judgment:

Held, that the principal could not be deprived of the right secured to him by the law of having the proceeds of his property sold under the execution restored to him on the reversal of the judgment upon which the execution issued.

General Term, First Department, October, 1874.

MOTION for reargument of appeal from order directing restitution of moneys collected.

Titus B. Eldridge, for appellant.

Gray & Davenport, for respondent.

DANIELS, J. — The terms "public policy" contained in the opinion delivered upon the decision of this appeal should be "policy of the law." That policy forbids an agent, by any

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underhand arrangement or device, from becoming the owner of his principal's property employed in or about the agency. Such an arrangement was clearly shown by the affidavit of the defendant, which was stated to be a true disclosure of the facts by the affidavit confirmatory of it made by his counsel.

The arrangement, in brief, was that the principal's property should be sold upon the execution issued in favor of the defendant and purchased by the agent, and the proceeds, after payment of the sheriff's fees, which were fixed at the exorbitant sum of \$200, paid over to the defendant, and that no restitution of it should be made in case of a reversal of the judgment. This arrangement was so far carried into effect that the property was sold and purchased by the agent, and the proceeds disposed of in conformity to the understanding. No proof was made that the agreement or its performance ever became known to the principal whose property, by means of it, was transferred to his agent; for the sworn statements of the agent, made in a prosecution instituted against him by his principal, and his unsworn admission that such was the fact, would not have been evidence of that fact against the principal, even if they had been set out in the opposing affidavits (*Anderson agt. Rome, Watertown and Ogdensburg R. R. Co.*, 54 N. Y., 334).

It is not probable that the arrangement itself, or the transaction under it, was communicated to or approved by the principal. The establishment of such a fact requires reasonably clear evidence to support it. No such evidence was supplied by the affidavits produced upon the hearing of the motion, and without that proof the principal could not be deprived of the right secured to him by the law of having the proceeds of his property sold under the execution restored to him on the reversal of the judgment upon which the execution issued. There is nothing inconsistent with this conclusion contained in the intimation which, it is affirmed, was made by two of the judges in the court of appeals when the case was argued before that tribunal. The criticism, at most,

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was merely directed to the use of the terms public policy, which, by some inadvertence in writing, copying or printing, appeared in the opinion delivered upon the decision made in this court, as it was printed with the case.

The motion should be denied.

DAVIS, P. J., and BARRETT, J., concurred.

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SUPREME COURT.

HENRY L. BURROUGHS, respondent, agt. ELSIE R. NORTON,
appellant.

Dismissal of appeal — notice of appeal not signed.

Where the county court dismissed an appeal taken from a judgment of a justice's court, on the ground that the notice of appeal was *not signed* either by the appellant or his attorney, although the attorney for the appellant indorsed on the back of it: "Notice of appeal, H. N. Warner, appellant's attorney, Hartwick, N. Y." *Held*, error.

It is not necessary that the notice of appeal should be signed by the appellant personally; it may be signed by others for him, and the indorsement of the appellant's attorney on the back of the notice was sufficient. Besides, the defect might have been cured by amendment.

General Term, Third Department.

Before MILLER, P. J., BOOKES and BOARDMAN, JJ.

APPEAL from an order of the Otsego county court dismissing the appeal from a justice's judgment, by the defendant, upon the ground that neither the defendant nor his attorney signed the notice at the bottom thereof. It appeared, however, that the attorney for the defendant indorsed upon the back of the notice the following words: "Notice of appeal; H. N. Warner, appellant's attorney, Hartwick, N. Y." By the affidavit used upon the motion to dismiss the appeal, it also appeared that the appeal was taken in good faith; that the name of the appellant was not signed to the notice of appeal at its bottom by reason of a misapprehension of the person to whom they were given to serve,

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and that the notices were not returned by the plaintiff or justice upon whom they were served.

J. A. Lynes, for appellant.

S. S. Morgan, for respondent.

BOARDMAN, J. — The Code, section 353, requires the service of a notice of appeal within twenty days after judgment. It has been held to be sufficient if such notice is signed by the appellant by his attorney (*Hall agt. Sawyer*, 47 Barb., 116). It is not necessary that the appellant should personally sign the notice. It may be signed by others for him, and it will be good. In this case the signature was upon the back of the notice, and not at the end of it. It cannot be that such a variance from the usual forms is of any consequence. If the notice indicates that the defendant in the judgment appeals to the county court, giving the grounds upon which the appeal is founded, and the notice is signed or superscribed by some person as attorney for such appellant, it will be sufficient if served within twenty days. By reference to the notice in this case it is apparent that the plaintiff was not and could not be deceived by any real or apparent defect. He knew who the appellant was and that he was represented by his attorney. The judgment appealed from is described in the notice. The affidavits of the defendant show a good ground for an appeal, and an attempt in good faith to perfect the same by the service of such notice. The objection, therefore, if well founded, is purely technical. The policy of the law is liberal in giving the right of review, and such right should not be curtailed without sufficient cause.

The notice of appeal is sufficient, and the court erred in dismissing the appeal upon the assumption that it was fatally defective.

If, however, this conclusion can be questioned, it is still

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apparent the defect could and should have been amended. By section 327 of the Code, an omission or mistake in any act necessary to perfect the appeal may be cured by amendment, when a notice of appeal has been given in good faith (4 *Waifs S. C. Pr.*, pp. 222, 395, and cases cited; 13 *How.*, 409). That power would be enough to warrant a court in making such an amendment, without resort to the more general power given by section 173 of the Code.

But, on the first ground stated, we think the order of the county court should be reversed, with ten dollars costs of this appeal.

Security Bank of N. Y. City agt. Nat. Bank of the Commonwealth.

SUPREME COURT.

THE SECURITY BANK OF THE CITY OF NEW YORK, respondent,
agt. THE NATIONAL BANK OF THE COMMONWEALTH,
appellant.

Judgment by default set aside—leave to answer given—appealable order.

Where a receiver was appointed under the national bank currency act of the assets of an insolvent national bank—the defendant, and an action thereafter commenced against the defendant by service of summons upon the president, who for some reason or other refused to inform the receiver of the commencement of the action and a judgment was recovered by default :

Subsequently, at the instance of the receiver, an order was procured for the plaintiff to show cause why the judgment should not be set aside and the defendant have leave to answer the complaint—which motion was heard and denied, with leave to renew, and subsequently was finally denied: From this order an appeal was taken to the general term, which was strenuously resisted on the ground among others, that the order being one of a discretionary nature, was not appealable:

Held, that it did not follow, because the order was discretionary, that it was not appealable; for the Code renders all orders appealable to the general term which either affect a substantial right; or are made in summary applications after judgment, and affect a substantial right. This right is not qualified by the fact that the order shall not be one of a discretionary character.

General Term, First Department, October, 1874.

APPEAL from order denying motion to set aside judgment recovered by default, and for leave to answer.

H. Edwin Tremain, for appellant.

Wm. H. Arnoux, for respondent.

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DANIELS, J. — A receiver was appointed under the national currency act (*Vol. 13, U. S. Statutes at Large*, 115), of the books, assets and records of the defendant, as an insolvent national banking association, in September, 1873; and he entered upon the discharge of his duties in that capacity. After that, and on the 4th of March, 1874, the summons in this action was served upon George Ellis, the defendant's president, and he, to use his own language concerning his singular and extraordinary conduct following the service, supposing that his connection with the bank ceased by the appointment of the receiver, "took no notice of any papers that were served upon him as an officer thereof, and did not do so in regard to the summons herein, nor did he inform said receiver of said service." This is the sworn statement of the defendant's president, and it so completely describes his utter want of moral, as well as official sense of accountability, as to dispense with all further attempts at characterizing his conduct.

The consequence of this inexcusable neglect to inform the receiver of the service of the summons was, that on the 17th of April, 1874, a judgment was entered in favor of the plaintiff and against the defendant, for nearly \$57,000; and the receiver swears that his first knowledge of its recovery, or of the commencement of the suit, was on or about the 21st day of April, 1874, when a transcript of the judgment was presented to him by the plaintiff's attorneys.

On the 11th of May, 1874, an order was procured at the instance of the receiver and some of the defendant's directors — who were actuated by a different sense of duty from that which impressed its delinquent president — for the plaintiff to show cause why the judgment should not be set aside and the defendant have leave to answer the complaint; and on the twenty-sixth of that month the motion was heard and denied, with liberty to renew it on further affidavits. It was renewed again, on additional affidavits, on the 16th of June, 1874, and then finally denied. The present appeal is from

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the order then made ; and it is resisted strenuously on the ground, among other reasons, that the order is not appealable. The particular reason assigned in support of that objection is that the order was one of a discretionary nature ; and that it most certainly was. But it does not follow from that circumstance that the order is not appealable ; for the Code renders all orders appealable to the general term which either affect a substantial right, or are made in summary applications after judgment, and affect a substantial right (*Code*, § 349, *subs.* 3, 5). This right is not qualified by the fact that the order shall not be one of a discretionary character. No such qualification has been attached to the right of appeal taken to the general term. In this respect the appeal differs from that which may be taken to the court of appeals ; for when an appeal is taken from an order affecting a substantial right, to that court, the order to be appealable there, must be one which does not involve any question of discretion (*Code*, § 11, *sub.* 4). The distinction existing between the two courts in this respect is clear and decided ; and the law making it provides for an appeal to the general term from an order affecting a substantial right, even though it may be of a discretionary character (*People agt. N. Y. Central Railroad Co.*, 29 *N. Y.*, 418 ; *Matter of Duff*, 41 *How.*, 350 ; *Livermore agt. Bainbridge*, 47 *How.*, 254).

This term, substantial, had no special legal signification when it was incorporated by the legislature into the Code for the purpose of describing the cases in which appeals from orders could be taken to the general term. For that reason it must be construed according to its popular and usual signification ; and, understood in that manner, it includes all positive, material and absolute rights, as distinguishable from those of a merely formal or unessential nature. An obligation imposed upon a party by an order subjecting him to the payment of a sum of money, great or small, has been held to fall within this designation of an order affecting a substantial right, and, therefore, appealable to the general term, even

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though discretionary (*People agt. N. Y. Central Railroad*, 29 N. Y., 421, 422).

That was the nature of the judgment recovered in the present action ; and the order appealed from, by the denial of a defense, imposes upon the defendant an actual, positive obligation for its payment. As long as that order remains in force the obligation to pay is unqualified and irrevocable. Besides that, the right to defend against a demand made in a court of justice by way of action, is of a positive and substantial nature. It is one which has been secured with care and consideration in the administration of the law ; so much so, that judgments recovered without affording an opportunity for defense have, with great uniformity, been held ineffectual and void wherever the principles of the common law have prevailed ; and the general course of practice has been maintained so as to secure the observance of that right in favor of parties who have not forfeited it by laches, or some other course of conduct rendering it inequitable, under the circumstances, to afford relief. This power has been conferred upon the court in which the action may be pending, and not upon any exclusive term or branch of the tribunal.

It is true that the right of appeal from orders involving its exercise has often been denied on the mere ground that the order made was discretionary in its character ; but as that reason is very clearly untenable, and has been so declared by authorities controlling the action of this court, it is not necessary to refer more particularly to the cases in which that denial has been sustained. It is sufficient to say that under the exposition now given to the statute, and which is sustained by its terms and the authorities already cited, all orders affecting a substantial right are appealable to the general term ; and the order appealed from in this case is one of that character.

The power, as already mentioned, has been conferred upon the court in which an action may be pending, upon such terms as may be just, at any time within one year after

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notice thereof, to relieve a party from a judgment, order, or other proceeding taken against him, through his mistake, inadvertence, surprise or excusable neglect (*Code*, § 174). The power, it will be seen from this reference, has been supplied, in very general terms, but the circumstances rendering its exercise discreet and proper are not mentioned. They are, therefore, by another provision, left to be ascertained according to the preceding course and rules of practice (*Code*, § 469). And by them a party was always relieved from an excusable default, where he appeared to have merits in his favor and the application was made promptly after the discovery of the default.

For the purpose of showing merits, a sure and certain defense was never required. What was necessary for that purpose was a probable defense to the claim made, alleged by the party in good faith; and the usual evidence required of its existence was an affidavit of merits, which, under ordinary circumstances, was not allowed to be controverted, because of the danger of injustice resulting from such a mode of trial. In *Hanford agt. McNair* (2 *Wend.*, 286) affidavits were produced denying that the defendant had a defense; and, by way of answer to them, SAVAGE, C. J., replied, that "The court does not hear affidavits in opposition to an affidavit of merits." That, as a general proposition, still continues to be the law; but, in cases where the good faith of the party may well be doubted, they may be received for the purpose of confirming the propriety of that doubt; and in such cases the court may go further, and require a disclosure of the case, so far as to enable it to determine whether the application be made in good faith, and not for the simple purpose of delay. That is the common practice, and it is sanctioned by a moderate exercise of the discretion conferred upon the court.

But, still, where the application for relief from the default is promptly made, and no reason exists for suspecting the good faith of the applicant, it should uniformly be allowed

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to prevail. This was the course pursued when the rules of practice were applied with greater strictness than has been observed since the enactment of the Code of Procedure. In *Davenport agt. Ferris* (6 *John.*, 131) the motion to open the default was made before the court in banco, and THOMPSON, J., declared himself in favor of setting "aside a default whenever the party swears to a defense on the merits, and no opportunity for a trial has been lost." VAN NESS, J., concurred, for the same reason, and KENT, C. J., assented, without giving any reason. A similar motion was made in term time in *Tallmadge agt. Stookholm* (14 *John.*, 342), where it was held that the court had adopted the general rule "that a default for want of a plea, though regularly entered, will be set aside, in every case, on the payment of costs, where there is an affidavit of merits and no trial has been lost." And the same rule was again declared by the court in *Packard agt. Hill* (4 *Cowen*, 65).

Under this rule the defendant was entitled to be relieved from the judgment recovered through the intentional misconduct of its presiding officer, and allowed to answer; for the application was made with reasonable diligence, after the discovery by the receiver of the default, to whose protection the law had confided the interests of the defendant and its creditors. The default was excused by showing the intentional concealment of the service of the summons, and the probability that the judgment had been recovered by the connivance and desire of the officer on whom the service was made. The application was also supported by a proper affidavit of merits; an affidavit of the bookkeeper that \$50,000 of the plaintiff's demand was not credited upon the defendant's books, and the affidavits of ten of the defendant's directors that they had no knowledge or information of the existence of such a loan, and some evidence that it consisted of money borrowed for his own personal uses by the person on whom the summons in this action was served.

Although the affidavits and proofs of the plaintiff used on

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the motion tended to show that the loan was made to its president for the defendant, the case still indicated that the liability was contested in good faith, and with a probability, at least, that the receiver and the directors co-operating with him might in the end prove to be successful in the defense of the action. And that probability was in no slight degree sustained by the misconduct of the defendant's president, for it afforded good ground to suspect that he concealed the service of the summons from the other officers of the defendant and from the receiver then in charge of its books, records and assets, for the purpose of charging such assets with the payment of a debt owed solely by himself.

The bank continued to exist, notwithstanding the appointment of the receiver. The suit was, therefore, properly instituted against it, and the defense should, accordingly, be made by it (*Bank of Bethel* agt. *Pahquogue Bank*, 14 Wal., 383).

The order appealed from should be reversed, with ten dollars costs, and disbursements on the appeal, to the defendant and appellant; and an order should be entered setting aside the judgment, and allowing the defendant within ten days after notice of the order, to serve an answer to the complaint, on payment, within that time, of ten dollars, costs of opposing the motion and the disbursements made on the entry of the judgment.

DAVIS, P. J., and LAWRENCE, J., concurred.

Doyle agt. Lord.

NEW YORK SUPERIOR COURT.

MICHAEL DOYLE *et al.* agt. SAMUEL LORD, Jr., *et al.**No covenants by implication as to real estate.*

The statute is explicit that no covenant shall be implied in any conveyance of real estate. A lease is a conveyance within the meaning of statute.

Special Term, November, 1874.

FREEDMAN, J.—Plaintiffs' claim to relief rests wholly upon the lease by Ann Gillett, of the store on the first floor of No. 85 Forsyth street.

This lease did not carry with it an implied covenant against the obstruction of the windows in the rear of the store. The statute (1 *Rev. St. [Edm. ed.]*, 689, *sec.* 140) is explicit that no covenant shall be implied in any conveyance of real estate, and a lease is a conveyance within the definition of that term contained in the statute. The only exception that has ever been recognized by the courts is that the grantor or lessor is held to warrant, by implication, that he has title. In all other respects the rule of *caveat emptor* applies (*Canaday agt. Stiger*, 3 *Jones & Sp.*, 423; *affirmed*, 55 *N. Y.*, 452).

Nor did the lease carry with it, as a part of the thing actually demised, the right in the store to derive light and air from the lessor's adjoining land. *Myers agt. Gemmel* (10 *Barb.*, 587) and *Palmer agt. Wetmore* (2 *Sandf.*, 316) are conclusive upon me upon this branch of the case. In this connection it may be pointed out that the English doc-

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trine of prescriptive right to ancient lights (which rests wholly upon implied covenants in deeds) though recognized in some of the United States, has been expressly repudiated in this state in *Parker agt. Foote* (19 *Wend.*, 318). It was held to be inapplicable to the growing cities and villages of this country. This case has been followed in *Pierre agt. Ferwald* (26 *Me.*, 436); *Napier agt. Bulwinkle* (5 *Richd.*, 99); and *Cheney agt. Stein* (11 *Md.*, 1). In Massachusetts the doctrine, if it was ever recognized, was changed by positive enactment.

Nor did the lease grant the yard or any rights therein as appurtenances. I agree with the learned judge who denied the motion for an injunction, that the premises are virtually described as bounded by the four walls of the store. The lease, therefore, carried nothing beyond the boundary as an appurtenance except, perhaps, such rights as were clearly and absolutely necessary to the enjoyment of the demised premises in any way, as, for instance, a right of way to the premises, if such right were necessary to obtain access. But the strict necessity and location of such a right must be shown by extrinsic evidence. Now, instead of its being shown that it was necessary, or that it was the intention of the parties that a right to the use of the yard should pass to the plaintiffs, it does appear that, at the request of the plaintiffs themselves, all access to the yard from the store was effectually cut off at or before the commencement of their term.

For these reasons the erection by the defendants of a building within about two feet and eight inches of the rear wall of the said store does not entitle the plaintiffs to the relief prayed for. They should have protected themselves by an express covenant.

The defendants are entitled to judgment dismissing the complaint with costs.

Kilburn agt. Coe.

SUPREME COURT.

ELISHA KILBURN and another, administrators, &c., agt.
MILES COE.

Action for damages under the excise law.

Damages arising from injuries to property and loss of property sustained by an habitual drunkard, may be recovered under the excise law against any person unlawfully making the sale of the liquor by means of which the injuries arose. The statute in general terms declares it unlawful to sell intoxicating liquors to any person guilty of habitual drunkenness (2 R. S. [5th ed.], 944, § 21).

Such injury to the habitual drunkard being against his property or estate, as distinguished from a mere injury to his person, an action for damages may be brought, in case of his decease, in favor of his executors or administrators of his estate (3 R. S. [5th ed.], 746, § 1).

Chautauqua Circuit, September, 1874.

THE plaintiffs, as administrators of the estate of Ira Bently, deceased, bring this action against the defendant, for the recovery of demands arising under the excise laws.

The plaintiffs allege, in their complaint, that the intestate was, for a number of years previous to his death, an habitual drunkard, and that during that time, the defendant, who had a license to sell by the quantity, sold to the intestate large quantities of strong and spirituous liquors, to be drank by him; and that by reason thereof he was greatly damaged by destroying his own property, while in that condition, and by reason thereof, and by being made incapable of doing labor, &c., &c.

The plaintiffs also allege that the intestate paid defendant large sums of money for the said liquors sold to him, when

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he was an habitual drunkard as aforesaid, and claim to recover for the money so paid.

The defendant demurs to the complaint :

1st. On the ground that the plaintiffs have not legal capacity to sue ; and,

2d. That there were not facts stated sufficient to constitute cause of action.

Jenkins & Congdon, for plaintiffs.

Allen & Thrasher, for defendant.

DANIELS, J.—The plaintiffs bring this action, as administrators of the estate of Ira Bently, for the recovery of demands alleged to arise under the excise laws of the state. It appears by the complaint that the intestate was an habitual drunkard, and that the defendant, knowing that to be the fact, from the year 1864 until the time of his decease, in 1871, sold and delivered to him in the town of Cherry Creek, strong and spirituous liquors, to be drank by him, and which were drank by him, and which disabled him from following his ordinary pursuit and occupation, by means of which he lost his property, and was otherwise injured. A claim is also made for the moneys paid for the liquors sold, amounting to the sum of \$300. The defendant, during the time mentioned, was a licensed vendor of strong and spirituous liquors.

To the complaint alleging these facts and demanding judgment for the injuries sustained, the defendant demurred for want of legal capacity in the plaintiff to sue, and because sufficient facts were not alleged to constitute a cause of action.

It is urged in support of the demurrer that it does not appear by the complaint that the liquor was sold within this state, but that position is unsound for the reason that it is alleged to have been sold in the town of Cherry Creek, and that is previously alleged to be one of the towns of the county named in the complaint, which is Chautauqua county.

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The statute in general terms declares it unlawful to sell intoxicating liquors to any person, guilty of habitual drunkenness (2 *R. S.* [5th ed.], 944, § 21). And from the facts appearing in the complaint, that prohibition has been violated by the defendant, for knowing the intestate to be an habitual drunkard, he sold and delivered him strong and spirituous liquors for a period of over ten years, for the purpose of being drank, and which were drank by him. By the section referred to, the sale to such a person as the intestate was, is declared to be, in each instance, unlawful. And by another section of the same statute, it is provided that any person, who shall sell strong or spirituous liquors or wines to any of the individuals to whom it is declared by this act to be unlawful to make such sale, shall be liable for all damages, which may be sustained in consequence of such sale; and the parties so offending may be sued in any of the courts in this state, by any individual sustaining such injuries (2 *R. S.* [5th ed.], 942, § 29). Precisely what was the entire design of the enactment of this provision, was not clearly expressed by the terms used creating it. But like all other statutes, it must be reasonably construed from the language made use of, for the purpose of securing the result, which must have been intended to be accomplished. The individual sustaining damages by means of, and as a consequence of, the sale, is secured the right by this provision of maintaining an action, for their recovery, against the person unlawfully making it. One of the consequences of the sale is to deprive the purchaser of the price paid for the article sold, and to that extent it may be safely affirmed, that he is injured by and in consequence of such unlawful sale. That is a damage, in the language of the section, which is sustained in consequence of the sale, and for the recovery of that damage, the injured party may maintain an action. Unlawfully depriving a person of his money, or other property, on general principles, creates a right of action in favor of the injured party, and the legislature certainly designed to go so far by the enactment of the section,

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as to apply that to the case of a person unlawfully obtaining another's money, by the sale of strong or spirituous liquors. By the procurement of his money in that way, the intestate did sustain damages in consequence of the sale, and for those damages, he could have maintained an action under this provision of the statute.

And as he could maintain such an action, it would seem to follow that the same right exists in favor of his personal representatives. It was an injury to the interests of the intestate of a proprietary character, as distinguished from a mere injury to his person. And when the injury is such as affects the estate or property of the intestate, it may be redressed by an action in favor of the executors or administrators of his estate (3 *R. S.* [5th ed.], 746, § 1). This section includes all rights of action not contained in the succeeding section of the statute. And a demand of the nature of the present one is not within either of those exceptions. So far as the plaintiffs sue for the money received unlawfully by the defendant, the action can be sustained. But whether they can in any event recover anything beyond that, it is not necessary to consider in the disposition of the present demurrer.

The plaintiffs must have judgment on the demurrer, with leave to the defendant to answer in twenty days, on payment of the costs of the demurrer.

First Nat. Bank of Lyons agt. Ocean Nat. Bank of N. Y. City.

NEW YORK COMMON PLEAS.

FIRST NATIONAL BANK OF LYONS, respondents, agt. OCEAN NATIONAL BANK OF THE CITY OF NEW YORK, appellants.

Bailment — for benefit of both parties — liability of bailee for loss.

Bailments are divisible into three kinds: 1st. Those in which the trust is for the benefit of the bailor. 2d. Those in which the trust is for the benefit of the bailee; and 3d. Those in which the trust is for the benefit of both parties.

Where the defendants — a bank, located in the city of New York — by their circulars, sent to many of the banks in the western states, solicited their accounts, and, amongst others, the account of the plaintiffs — a bank, located in the state of Iowa — and as an inducement, offered to pass checks on certain places to its credit, upon the day of their receipt, and to buy and sell government bonds, gold and stock for the plaintiffs, without charge;

Held, 1st. That this come under the third subdivision of bailments above mentioned.

Held, 2d. That this arrangement having been gone into, in pursuance of such circular, it was obviously as an inducement to the plaintiffs to place its accounts with the defendants, that the offer was made to gratuitously pass checks to its credit, and buy and sell for it here, government bonds, gold and stocks; and there was necessarily implied in this proffered service a safe keeping of such bonds, &c., as they should buy whilst they remained with the bank, subject to the plaintiffs' order. It was an undertaking to exercise ordinary care, or that degree of diligence which men of common prudence exercise in respect to their ordinary affairs.

The defendants' bank was subsequently broken open and robbed, whereby the plaintiffs lost their property. It was claimed that the utmost engagement of the defendants was to use and appropriate for the safe keeping of plaintiffs' property such means, aids, appliances and agencies as they had when plaintiffs became their bailors, or as they might choose thereafter to require for their own benefit. That the plaintiffs accepted at their own risk what the defendants had to offer, and if it proved to be insecure, that the plaintiffs have no right to complain.

Held, 3d. That this is distinguishable from the class of cases to which such

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a rule as this has been or ought to be applied. The plaintiffs had the right to suppose, from the circular, that the defendants used the ordinary means of institutions, undertaking so important a trust for the safe keeping of property of this description; and that when advised of any danger from burglary and robbery, that it would make use of such precautions for the safety of what was intrusted to its care, as would be dictated by common prudence and the exercise of ordinary vigilance. Indeed, the strong feature in the case is, that there was reasonable ground for apprehension that an attempt would be made to rob the bank.

Held, 4th. That the question whether the defendants did exercise the care and diligence which was required of them from the nature of the bailments was a question which was not, under the circumstances, a question for the court but for the jury.

Held, 5th. That after a careful review of the whole testimony, the case having been submitted to the jury, under a charge, it must be regarded upon the whole, as favorable to the defendants, and it being a matter which was solely for them, the verdict should not be disturbed.

General Term, July, 1874.

APPEAL by defendants from a judgment at special term.

Francis N. Bangs, counsel for defendants, appellants.

Lucien Birdseye, counsel for plaintiffs, respondents.

DALY, C. J. — The defendants, by their circular, solicited the accounts of the plaintiffs' bank, and as an inducement offered to pass checks on certain places to its credit upon the day of their receipt, and to buy and sell government bonds, gold and stocks for the plaintiffs without charge. It is insisted by the appellants that this offer was so stated as to exclude the idea that the defendants gratuitously undertook the care and safe keeping of negotiable bonds; on the contrary, I think this was necessarily implied from the very nature of the offer. The plaintiffs were a bank doing business in the state of Iowa, and the defendants indirectly regarded it as an advantage to them in the carrying on of their banking business to have the account of this distant bank in Iowa at the rate of four per cent on its daily balances; the substance of

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the circular was that they would be happy to have its accounts, and it was obviously as an inducement to the Bank of Lyons to place its accounts with them, that the offer was made to gratuitously pass checks to its credit, and buy and sell for it here government bonds, gold and stocks, and there was necessarily implied in this proffered service a safe keeping of such bonds, &c., as they should buy whilst they remained with the bank subject to the plaintiffs' order. It was an undertaking to exercise ordinary care or that degree of diligence which men of common prudence exercise in respect to their ordinary affairs (*Giblin agt. McMullen, L. R. [2 P. C. App.], pp. 337, 338*).

It is claimed that the safe keeping of such bonds as the defendants might buy for the plaintiffs formed no part of the business of a banking corporation, and that if undertaken by the cashier or other officer of a bank it was an individual undertaking on their part, being in no way connected with the purpose for which the corporation was created; that the authority which the defendants had was to exercise such incidental powers as should be necessary to carry on the business of banking, such as the discounting of paper, and the buying, loaning and issuing of notes, &c., and not by taking negotiable bonds for safe keeping, without reward, at the risk of the bank and of its stockholders. If there was nothing more than an offer on the part of the cashier, or other officers of the bank, to buy and sell bonds, &c., for the plaintiffs, there would be force in this reasoning, and I should have no hesitation in holding that, in such a case, the bank, as a corporation, would be under no obligation for the safe keeping of such securities. But it cannot be said that what was proposed in the printed circular, which the cashier sent the plaintiffs, and to nearly every western bank, was not in the business of banking. The receiving of deposits of money, and the paying of it out on the check or drafts of the depositors, forms a part, and a very considerable part of the business of banking. The eighth section of the act of congress of June 5, 1864,

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enumerates, as among the incidental powers necessary to carry on the business of banking, "the discounting and negotiating of notes," &c., &c., and "the receiving of deposits" (*Laws of Thirty-eighth Congress*, p. 106). By having a large number of small deposits the possession of a considerable amount of money is insured to a bank at all times, by which it is enabled to add to its discounts and thereby increase its gains. The inducement to the depositor is the convenience of having a safe place where he can put his money as he receives it, and from whence he can draw it as he wants it; and the inducement to the bank to keep such accounts, and render this service to the depositor gratuitously, is the advantage above stated, that it enables it to enlarge its discounts. This being a legitimate branch of its business, it is entirely within the scope of such a business that a bank should offer other and additional inducements to secure the deposits of institutions as well as of individuals, and this was what was done in this case. The cashier sent, as he testified, to nearly every western bank a printed circular, prepared and signed by him, stating that the defendants, The Ocean National Bank, solicited the account of the bank addressed, upon the terms above stated, and setting forth, as already recited, what they did for the banks whose accounts they had. Letters were also read, sent by the assistant cashier to the cashier of the plaintiffs, in acknowledgment of inclosures received from them of bonds, coupons, coin, &c., which letters are headed with the names of the president, the cashier and the assistant cashier, with the title of their respective offices beneath their names, and containing over the name of The Ocean National Bank of the City of New York, the words "Designated Depository and Financial Agent of the U. S.," in the foot of which letters the assistant cashier writes to the plaintiffs' cashier as follows: "We shall use our best efforts to prove to you the strength of our circular, and to make our correspondence an agreeable one." All of which shows that what was proposed was proposed by the bank through its ordinary officers, and that what-

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ever benefit or advantage was derived from its acceptance was derived by the bank alone.

Under these circumstances it is by no means clear to my mind that what was implied in this general offer, the custody and safe keeping for their correspondents of such bonds, &c., as they should buy for them, whilst they remained in their hands subject to the correspondent's order, was in strictness a gratuitous bailment.

Bailments are divisible into three kinds: 1st. Those in which the trust is for the benefit of the bailor. 2d. Those in which the trust is for the benefit of the bailee. 3d. Those in which the trust is for the benefit of both parties (*Story on Bailments*, § 3), and this appears to me to come under the third subdivision. It is a case in which the defendants, by a general circular addressed to a number of banking institutions, offer to do certain things in this city for the institution addressed, if it will keep its account with the defendants, that is, keep its deposits in this city with them. This is something more than a mere naked or one-sided bailment. It is an arrangement for the benefit of both parties. It is an offer made by the defendants, and not a request proceeding from the plaintiffs. A bailment, it is true, may be gratuitous, where the offer is made in the first instance by the bailor, but that is when it is understood by both parties that the service is to be performed without any recompense. But here the offer was conditional. It was an offer to do something for the advantage of the institution addressed, if it would do something else which was for the defendants' advantage, whereas a gratuitous bailment is one where the benefit is all on one side. It was a request to deposit all the available funds which the western institution might have in the city of New York with the defendants, at a low interest upon average balances, that the defendants, by having constantly a large amount on deposit, might increase its loans or discounts at the legal rate of interest. In other words, that they might get seven per

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cent for the use of that for which they were to pay but four per cent.

It was a plain business transaction, by which they expected to be benefited quite as much as the institution to which they applied, for it may fairly be assumed that they would not have sent circulars containing this offer to nearly every bank in the western states, if they did not expect some benefit or advantage from the acceptance of it. It was evidently a scheme by which they expected to, and by which they probably did, largely increase the amount of their deposits, and is to be regarded as a business undertaking in which, for what they undertook or agreed to do, they expected to be amply recompensed or compensated by what they required their correspondents to do. What was agreed to be done on one side was incident to what was expected to be done upon the other, and the whole is to be taken together. The crediting of checks on Boston, &c., and the buying and selling here, of bonds, coin and stock for the bank to which the offer was made, being undertaken from the benefit to be derived from having the available funds of that bank in this city deposited with the defendants.

It was not, in my judgment, a gratuitous bailment of that description which would justify the rule that has been laid down in some of the adjudged cases, which exempts the bailee, from the gratuitous nature of the bailment, in the event of loss, unless it was occasioned by gross negligence or willful neglect equivalent in its nature to a breach of faith, or in practice equal to a fraud (*Foster agt. Essex Bank*, 17 *Mass.*, 479; *Tompkins agt. Saltmarsh*, 14 *Serg. & Rawle*, 275; *Whitney agt. Lee*, 8 *Metcalfe*, 91). It was an undertaking which, as I have already said, imposed the exercise of ordinary care, or that diligence which men of common prudence exercise in respect to their own affairs. This was the rule laid down by lord CHELMSFORD, in *Gibbons agt. McMullen* (*supra*), where the plaintiff, who had opened an account with the bank, deposited in the bank a box containing securities, of

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which he kept the key; which was not as strong a case as this, where the defendants undertook to do certain specific things if the plaintiffs would keep their account with them.

It is claimed that the utmost engagement of the defendants was to use and appropriate for the safe keeping of plaintiffs' property such means, aids, appliances and agencies as they had when plaintiffs became their bailors, or as they might choose thereafter to require for their own benefit. That the plaintiffs accepted, at their own risk, what the defendants had to offer, and if it proved to be insecure, that the plaintiffs have no right to complain. But this is distinguishable from the class of cases to which such a rule as this has been or ought to be applied. This was the acceptance, by a bank in a distant western state, of an offer made to it by a bank in this city, and receiving such an offer from an institution that had conspicuously printed upon its letters and correspondence "Designated Depository and Financial Agent of the U. S.," it had the right to suppose that it used the ordinary means of institutions undertaking so important a trust for the safe keeping of property of this description; and that when advised of any danger from burglary and robbery that it would make use of such precautions for the safety of what was intrusted to its care as would be dictated by common prudence, and the exercise of ordinary vigilance. Indeed, the strong feature in the case is, that there was reasonable ground for apprehension that an attempt would be made to rob the bank. And it is in view of this circumstance, of which the officers of the bank had repeated intimations and warnings, that the defendants' obligation, as the custodians of the large amount of money and securities, is to be considered. The question whether the defendants did exercise the care and diligence which was required of them from the nature of the bailments, was, in my opinion, a question which was not, under the circumstances, a question for the court but for the jury. If the test of ordinary care is that diligence which men of common prudence exercise in their own affairs, there is ordi-

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narily no means of applying it except to leave it to the judgment of a jury upon the circumstances of the particular case. I do not mean to say that there may not be cases in which the court can, as matter of law, say that this amount of care was or was not exercised, but to say that, in the great bulk of cases where that test is to be applied, the question ought to be left to the determination of the jury. The twelve men who sit in the jury-box are quite as competent to judge of the diligence which men of common prudence exercise in their own affairs as the men who sit in an appellate tribunal. It implies that knowledge of character and of the management of human affairs which is derived from observation and experience; and there are generally men upon juries (at least such has been my judicial experience) who have a more thorough knowledge of, and practical acquaintance with, the management of business than judges, and who are infinitely better able to apply such a test than those who pass their lives in acquiring a knowledge of the law, and in the administration of its rules and principles. In the present case it was shown that the officers of the bank had been warned by the police and others that there was reason to fear that an attempt would be made to rob it; that this was not a vague or general apprehension, but was founded upon a variety of circumstances which produced such an impression upon the officers of the police in that vicinity, and upon others, as to lead them to communicate their fears to the officers of the bank, upon whom, it would seem, these communications made little or no impression; and the question in the case was whether, in view of these repeated warnings, the officers of the institution took such measures as common prudence would have dictated for the preservation and security of their large amount of property which they had in their charge. They were apprised of the fact that in a previous year an attempt, or, at least, a preparation for an attempt, had been made to enter the basement of the bank building, which basement was then occupied by an insurance company. This was indicated by the finding

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of wax on the lock of the basement door, such as is used for taking the impression of key-holes, and that a month later the lock of the door was found to be broken, having been forced, and, as a witness expressed it, "burst by main strength and rendered valueless." And this circumstance induced vigilance on the part of the witness Holley, who was the surveyor of the insurance company. In connection with these facts he saw men loitering about the building whom he looked upon as thieves; of all of which circumstances he apprised the president, telling him that, in his opinion, these men were there for the purpose of robbery, and he cautioned the president against any attempt that might be made.

In the month of January following, five months before the robbery, Holley observed a man who came into the insurance office in the basement, under the pretense of examining the business directory; it was handed to him, he deliberately took off his overcoat and overshoes, and took a seat, looking at the directory. Holley suddenly turned his eyes toward him and found that he was not looking at the directory, but was casting his eyes about the office, and as the witness expresses it, "taking the lay or situation of affairs in the the basement;" upon which the secretary requested him to take his seat outside, where there was a desk and paper if he wished to make a memorandum, when the man left. Holley went the same day to the president and told him of this circumstance, upon which the president went down to the office in the basement, where the matter was talked over, and the president told Holley that prior to this circumstance, upon two occasions, persons were found during business hours in the bank; one inside the railing, by the wash-hand basin, and the other inside the railing of the bank itself; that one of the men who had been thus seen, jumped out of the water closet from the directors' room and out of the Fulton street window, upon the sidewalk; and it was shown by the testimony of the porter of the bank, immediately after this man jumped out of the window a jimmy was found upon the floor of the

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directors' room. This circumstance was known to the president, the cashier, the receiving teller and to one of the directors. These facts, as I have said, induced great vigilance on the part of Holley, and he made it a rule afterward to go to the office in the basement two or three times a week during the night, and upon every Sunday and holiday, scarcely leaving the office alone for six hours at a time after his suspicions were aroused. He told the president of the bank, upon several occasions, that he deemed it highly important to guard against the robbery of the bank, and that he (the president) ought by all means to have a watchman to guard the bank after it was closed at night. Again, that he ought to take extra precaution to guard the bank, telling him what he (Holley) had done in respect to lighting the basement, and expressed to him the opinion that he had better do the same; precautions which the defendants afterward adopted, it appearing that after the robbery they had the bank lighted at night, and kept a watchman there. Holley also called the president's attention to the robbery of the New York Exchange Bank, of the burglars digging under the foundation of two buildings, and, of the North River Bank, and through the side of that bank and up into the vault which contained the deposits of the New York Exchange Bank. He told the president many times (he thought about twenty times) that there should be a private watchman in the bank, and when the insurance company moved out of the basement in February, 1869, four months before the robbery, Holley said to the president, "that now that the watch-dog of the institution was gone he (the president) would now have to look out for the Ocean Bank himself;" to which the president replied that he thought he could do so, or something to that effect; that he thought he could take care of the bank himself, that he could get on very well and was not afraid of any robbery.

Holley further testified that upon almost every occasion when he talked to the president and inculcated the idea of his having an extra watchman, that the president would say it was too

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expensive, that the vaults of the bank were too strong for burglars ever to approach them; that they could not get into them, and that it was nonsense and foolishness to apprehend any danger; that he did not apprehend it himself; the best commentary upon which is what he said to Holley after the robbery: "For God's sake and mine, never make any mention of any conversation that has passed between you and me in relation to the robbery of this bank." This witness is characterized by the counsel for the appellants as a "professional alarmist," but it is, in my opinion, impossible to read the testimony in the case without the impression that if his advice had been followed the event that has given rise to this suit would have been avoided. But Holley was not alone; the porter of the bank called the attention of the president to men who were watching the bank from the street; he showed the jimmy to the president, advised the keeping of a night watchman, and a few days before the robbery called the president's attention to the fact that the windows of the basement were closed, as a strange thing, and received for reply that the people who had leased the basement were to look after that. The suspicions of the police were aroused as early as the fore part of 1869. A police detective received information which he communicated to the sergeant of police of that precinct, and the captain received orders to watch the bank in February and March, and this watching was continued until within a few weeks of the robbery. Another sergeant had his attention specially turned to the bank three or four months before the robbery, having heard that a raid was to be made upon it. Several policemen saw, watched and arrested improper characters about the bank, parties whom they knew to be thieves. One especially celebrated character and his pals were seen by one of the sergeants loitering about the bank, with no apparent business or ostensible purpose, as thieves generally do, taking a sort of measurement of the building, passing, crossing, lingering or loitering about there until within thirty days of the day of the robbery. Sergeant Phillips within a

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month before the robbery, received information that the bank was going to be robbed on a certain Sunday night, and had it watched that night until midnight. A noted criminal, who had the character of preparing and making up burglarious burglaries, was seen around the bank by the police, and other suspicious characters were seen by the officers—persons who go up and stand in the hallway and who come back without going in. Suspicious characters being noticed by the police, especially on Sundays, all of which was observed until about two weeks before the robbery when there was a lull, the burglars being then in all probability in possession of the basement and consummating the plans by which they reached the bank and its vault through the basement. The acts of the janitor attracted the attention of the police, such as his lounging about the bank; talking to women, white and black; lolling on the rail in a careless position that aroused the suspicion of the policemen, and in some instances it is sworn that he was intoxicated. In view of these circumstances sergeant Phillips made three visits to the bank, having two interviews with the cashier and one with the president. He informed the president that he did not consider the bank in a secure condition, that it was not properly watched and guarded, and that he had seen suspicious characters about whom he knew to be thieves; that one of them was the noted criminal already referred to, Dutch Heinrich, the notorious bank robber; that reports also were made to him (the sergeant) by detectives that they had seen suspicious characters around the bank, that it was a matter of great anxiety to the police, and that if a change was not made he would not be surprised to hear of the bank being robbed at any time; that he asked the president to make a change, recommended to him a safe and honorable man named Doughty, told him that the colored janitor was not of any use at all there; that he was no protection, that he was about the streets and drank too much; that the witness thought the janitor was intoxicated; that he had better have a good man in his place if he

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wanted the bank taken care of, and it would relieve the anxiety of the police very much. All this took place thirty or sixty days before the robbery, but it produced no effect. The cashier declined to give any answer and referred the matter to the president, upon whom the representation and warnings of the sergeant, it would seem, produced as little effect as the advice and warnings of Holley. The president's reliability upon the impregnability of the vault and safes were shown not only by the result to have been unfounded, but there was evidence which I shall not recapitulate in detail showing that his attention was called by experts to the importance of a safe with repads and steps to prevent wedging, and to the occurrence of robberies by the use of wedges. For six months before the robbery the outer door of the safe was closed with difficulty in consequence of lining it with steel, by which its weight was greatly increased, causing it to sag, whereas the expert by whom this change was made advised a different course, telling the president that the door-frame should be taken out and a new one put in, to which the door should fit, a suggestion of some importance, as it was at least a question upon the evidence whether the outer door was not in fact open on the night of the robbery, by means of which the burglars might have been enabled to get the key of the inner door, as the outer and second doors of the vault were found after the robbery to be entirely uninjured. It was a fair question, moreover, upon the evidence whether the janitor was a fit person to have intrusted with so important a charge, especially after the police sergeant told the president what the police officers and citizens had reported to him respecting the janitor's habits; that he was about the streets and drank too much, particularly as he was obtained from an intelligence office and came to the bank without any references or recommendation from his home or from New York.

There was also the circumstance that the basement, after the insurance company and their attaches had left it, was

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leased in March or April, a comparatively short period before the robbery, by a verbal lease, to a man then under the suspicion of the police, and who was afterward sentenced to the state prison, without any provision or restriction against subletting. This man (O'Kell), in June, let the room which was under the president's room, to a man named Cole, receiving the rent in advance up to July first; and Cole was never seen afterward. It was from this room, and by means of it, that the entrance was effected through the ceiling into the bank, and the robbery successfully executed. The insurance company assigned their lease to Newcomb & O'Neil, and the president who knew Newcomb, assented to it. These tenants were unable to pay their rent, and Newcomb wanted to dispose of the lease, and saw the president. The proposition was to lease the basement to O'Kell, and the president reluctantly consented to inquire into O'Kell's reputation. He did so; and after taking two weeks was not satisfied; but Newcomb becoming impatient, the president concluded to let O'Kell have the basement; so that, in point of fact, it was leasing the basement verbally to a person, although the president had not satisfied himself respecting him, and without putting him under any restrictions as to subletting it; and whether this was, in view of all the circumstances, an exercise of care to be expected of a man of common prudence, was a fair question to submit, with the other suggestions, to a jury. Whatever was done or ought to have been done, in the proper care of property, by the officers of the bank, is to be regarded as the act or omission of the corporation itself (*Bissell agt. M. S. & N. J. Railroad Co.*, 22 N. Y., 288). And the question to be passed upon was, whether, in view of the facts which had come to the knowledge of the officers of the bank and of the warnings they had received, it was a want of common prudence to lease the basement in the way in which they did; to dispense with such security as might be afforded by lighting up the bank and having a watchman there at night, and of having it visited regularly upon Sun-

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days and holidays ; in which was involved also the question whether a change ought to have been made in the janitor after the information communicated respecting him, and the opinion expressed by the police sergeant, who observed that he was not of any use at all, and afforded no kind of protection ; and whether measures should have been taken for the more effectual protection of the vault and of the safes, after what was communicated by experts and others respecting both. These were all matters for the consideration of the jury, which acquired an importance that perhaps might not otherwise have attached to them from the fact that the officers of the bank, who were forewarned by significant circumstances and by the opinions of experienced persons of the impending danger, the bank was left from Saturday afternoon until Monday morning, during which time the robbery was perpetrated, were safeguards which, in the judgment of persons of experience, were necessary, which might have prevented the robbery, and which, after the robbery, were adopted by the bank for its future protection.

The appellants argue that the robbery was effected by great cunning and patience, coupled with extraordinary audacity and resolution, combined with perfect mechanical skill, perfected in such a way as not to arouse suspicion, and yet, with ample preparation to overcome resistance ; and they liken it to a great conflagration, extraordinary, unexpected, and probably beyond the reach of very high and extensive exertion of diligence. Not having a light in the bank and the keeping of a watchman there at night was not a very high nor a very extensive exertion of diligence, in view of the fact that the bank had over two millions in money and securities in its vault. To nearly all who concerned themselves about the matter, except the president, the adoption of these additional means of security were thought necessary in view of what had occurred and been observed, and were strongly urged ; but he, as it would seem, with a blind fatuity, treated all such suggestions as nonsense and foolishness. The appel-

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lants argue that he relied upon the ample police force, the remoteness and strength of the vault, the height of the windows above, and the fact that the building fronted upon two streets, honestly deeming these sufficient. But he was informed of the great anxiety of the police for the safety of the bank, and was unwilling, or did not aid on his part, by doing what they pointed out to him as additional and necessary measures to protect it from robbery. It was, as I have said, left, under all these circumstances, from Saturday until Monday, under the care of the janitor, whom the president had been urged to remove, and who says he visited the bank upon Sunday, and went close to the vault without seeing anything to create suspicion, but whose statement the jury might very well, and probably did, discredit, as the various accounts which he gave of his visit did not agree with each other as respects the time or the circumstances. The case was submitted to the jury under a charge, it must be regarded upon the whole as favorable to the defendants; and it being a matter, in my judgment, which was solely for them, the verdict should not be disturbed.

I shall pass over the labored commentary of the appellants upon the judge's charge, and numerous exceptions taken to parts of it, without considering either in detail, as it would involve a repetition of the views already expressed. As a general observation, I am of the opinion that the defendants are not entitled to a new trial for any of the refusals of the requests to charge, or upon the exceptions taken to parts of the charge upon the ground as misdirection. Many of the exceptions may be regarded as coming under the exception taken to the general construction that the diligence required was proportionate to the danger of the loss, and that the great value of the property was an important element in fixing the liability for the loss, under which is included what was said about a country village where robberies are uncommon, and a populous city where crimes are frequent. As respects this general instruction and all that was said or excepted to under

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it, I have already sufficiently indicated my opinion. The defendants were not entitled to the positive instruction that if they took as much care of plaintiffs' property as they did of their own they were exempt from liability. It was, undoubtedly, a circumstance for consideration; but if the defendants claim to exercise the care of the plaintiffs' property which was required of them, it would be no defense that they did the same with respect to their own (*Dorman agt. Jenkins*, 2 *Adolph. & Ellis*, 256; 6 *Rob. A. P. M.*, 216; *Gibmon agt. McMullen*, *supra*). It was not an error for the court to refuse to charge that the burden was on the plaintiffs of proving gross negligence on the part of the defendants; and the same remark applies to the requests made and to the exceptions to the instructions given, which requests and exceptions were based upon the assumption of the appellants that all that was shown to establish the cause of action was, at the furthest, merely an error of judgment on the part of the defendants, and not the omission of any duty which they owed the plaintiffs. Of the numerous exceptions taken to evidence submitted by the plaintiffs, I have this general observation to make: That, in my opinion, the evidence objected to was admissible upon the general question whether there was or was not, under all the circumstances, a want of common prudence on the part of the officers of the bank. If there is any doubt it is limited to the proof of what the president said to Holley on the day after the robbery; but, after full consideration, I think this was admissible as to proof of an attempt on the part of an officer of the bank, whilst he was still acting as its president, to suppress important evidence bearing upon the question of the liability of the bank. Corporations are responsible for the wrongful acts and for the declarations and admissions of their officers, in their official capacity, in the management of the affairs and transactions of the business of the corporations done in the course and within the scope of its business (*Angell & Ames on Corporations*, secs. 310, 659). They do not differ, in this respect,

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from natural persons ; and if an individual, immediately after the loss of property intrusted to his care, should improperly attempt to suppress evidence tending to establish his negligence, I think the fact must be shown ; and if it is admissible upon the question of the existence or absence of negligence in the case of an individual, I do not see why it is not equally applicable in the case of a corporation. The president was acting for the bank and its interests, and with the knowledge of the intimation and warnings which the officers of the bank had previously received, and confronted by the fact that what was apprehended by the police and by Holley, the robbery of the bank had been accomplished, and more than \$500,000 of money and securities stolen. His attempt to induce Holley to keep silent was a very significant circumstance as an effort to save the bank and himself from liability for the consequence. It was an act in his own interest, and for that of the institution of which he was the chief officer ; and occurring, as it did, immediately upon the happening of the robbery, I think the court was right in allowing it to be proved. The evidence offered, as the defendants claim, to repel the presumption which might arise from their leaving Holley's evidence uncontradicted by the president was not admissible. It was shown by the secretary's evidence that the president had gone to South America, and was there at the time of the trial. They had the benefit of this, and were not entitled to show when the receiver of the defendants first knew that the plaintiff claimed that Holley had given the information to the president which Holley swore to when the receiver tried to postpone the trial until Martin returned.

Judgment should be affirmed.

ROBINSON and J. F. DALY, JJ., concur.

Roderigas agt. East River Savings Institution.

NEW YORK SUPERIOR COURT.

RODERIGAS agt. THE EAST RIVER SAVINGS INSTITUTION.
(Two suits.)

Jurisdiction by surrogate to issue letters of administration — in cases of estates of living persons.

Neither the legislature nor the courts have power to confer jurisdiction on surrogates over the estates of living persons.

The foundation of the theory of distribution of estates, whether under statutes of distribution or according to provisions of wills, rests upon the event of death.

A savings bank, therefore, which pays out deposits to a person appointed administratrix of the estates of two persons, depositors, when both depositors at the time are living, have no protection against the depositors, although it took two separate receipts from the administratrix at the time of payment.

Special Term, June, 1874.

On the 1st of October, 1857, James Devine and his wife, being residents of the city and county of New York, deposited two sums of money, of \$485 each, with the defendant, which was, and still is, duly incorporated under the laws of this state, for the purpose of receiving moneys on deposit and paying interest therefor. The deposit of one of these sums was placed to the credit of James Devine, and one to the credit of James Devine and his wife, Martha. Both these sums, with accrued interest, were paid on the 29th of May, 1869, by the defendant, to Isabella McNeil, as administratrix of the estate, &c., of James Devine and Martha, his wife, the said Isabella having been appointed such administratrix by the surrogate of the city and county of New York. The

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defendant took from her, as such administratrix, two separate receipts at the time of payment.

Neither depositor was dead at the time the said Isabella was appointed administratrix, nor at the time the payments were made to her.

The plaintiff was the wife of James Devine at the time of his death. He died intestate, on the 31st May, 1870, and letters of administration were duly issued to the plaintiff, on the 31st May, 1872, after she had procured the said letters of administration issued to the said Isabella McNeil to be revoked by the said surrogate.

S. Jones, for plaintiff.

J. W. C. Leveridge and S. P. Nash, for defendants.

SPIER, J.—The question in the case is, had the surrogate jurisdiction to grant the letters of administration which protect the defendant in making the payments to Isabella McNeil? The only justification for doing so, as claimed, is that it paid upon the strength of the letters issued by the surrogate of the city and county of New York. It must be conceded if he had no jurisdiction it would be no protection.

The defendant claims, through its counsel, in order to sustain the surrogate's jurisdiction for its protection, chiefly upon the ground that the state appoints, by judicial authority, certain persons who, upon the death of an individual, administer upon his personal property; and although the state does not profess to administer it unless the individual be in fact dead, there are many cases where the question of death, like other questions of fact, are difficult of ascertainment, and that in such cases it is within the legitimate province of the state, on presumptive proof of death, to authorize administration on his estate, establish tribunals to take such proof, providing safeguards sufficient to make the sanction of its judicial authority a protection to third parties. It claims that the state

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of New York has done this, and the cases at bar are to be determined by its statutory law alone.

Section 26, article 2, title 2, chapter 6, volume 2, Revised Statutes (*Edm'ds ed.*), page 75, is relied on: "Before any letters of administration shall be granted on the estate of any person who shall have died intestate it shall be proved to the satisfaction of the surrogate, who shall examine the persons applying for such letters, on oath, touching the time, place and manner of the death, and whether or not the party dying left any will; and he may also, in like manner, examine any other person, and may compel such persons to attend as witnesses for that purpose."

Again; it is provided that "the letters testamentary and of administration, and letters appointing a collector, granted by any officer having jurisdiction, shall be conclusive evidence of the authority of the persons to whom the same may be granted, until the same shall be reversed on appeal or revoked, as in the chapter provided (2 *R. S.*, 80, § 56).

In the twenty-sixth section it is assumed, by the very letter of the statute, that the proceedings take place only when "any person shall have died intestate," the fact of such person dying intestate shall be proved to the satisfaction of the surrogate. The court is not authorized to act except when the fact exists that the person shall have died intestate. The court is set in motion by the admitted jurisdiction, that such person has died intestate, and the proceedings are carried forward only upon that assumption. So, in the fifty-sixth section, the proviso is, that certain letters, issued by an officer having jurisdiction, shall be conclusive, &c. This, the defendant's counsel says, means granted by the proper officer, and on proper proceedings taken before him, and if it means that the letters are a protection only in case the proof before the surrogate was conclusive, the section is useless. With great respect, I think the learned counsel assumes the premises for the sake of his deduction. Jurisdiction here is conceded, and, therefore, the surrogate is authorized to issue certain letters,

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but it does not follow that he has authority to issue them under all circumstances, and much less where he has not the acquired jurisdiction. Nor in logical terms can the section be said to be useless; for the court, acting within the sphere of its original authority, the letters issued by an officer acting under such authority should be taken as conclusive, both as a useful and orderly proceeding on well settled principles.

The forty-seventh section (2 R. S., 79) is claimed to cover the whole ground assumed by the defendants. It is in the words following: "All sales made in good faith, and all lawful acts done, either by administrators before notice of a will, or by executors or administrators who may be removed or superseded, or who may become incapable, shall remain valid, and shall not be impeached; or any will afterward appearing, or by any subsequent revocation or superseding of the authority of such executors or administrators."

This section, like all others on this subject, is founded upon the fact that the surrogate shall and must have jurisdiction over the subject-matter before he could deliberate on the case. The proper surrogate obtains control over the personal estate of deceased persons only upon their death. He acts upon the estate either through administrators, according to the statute of distributions, or through executors, according to the provisions of a will. Having acquired jurisdiction by the event of death, the question whether there was a will or not, as determining the mode of distribution, falls within his province, and his action either in granting letters of administration or probating a will, as the case may be, cannot be attacked collaterally. By the actual facts of death and inhabitancy the surrogate acquires jurisdiction over the whole subject, and his action in granting letters of administration cannot be attacked for want of jurisdiction. In case of a will being subsequently proven, relief could be obtained by application to the surrogate himself, for a revocation of the letters of administration, in which case, as the grant of letters of administration was voidable, only the acts done under it

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would be valid. In *Prosser agt. Wagner* (1 *Com. B. [N. S.]*, 289), both the death of the party, and the granting the letters by the proper officer, was conceded. See also *Sheldon agt. Wright* (5 *N. Y.*, 497), as to the necessary result of the principles there laid down.

The statute of 1870 (1 *Laws of 1870*, p. 826) is also referred to as sustaining defendant's position. He claims that it being remedied it may well retract. The answer to this is, that "all lawful orders and decrees in proceedings in the surrogate's court, * * * and the objection of want of jurisdiction, except by appeal in the manner prescribed by statute, &c.," relate only to the case where such original jurisdiction has been acquired, and is to be construed in harmony with other statutes on the subject (1 *Kent's Com.*, p. 524, 525 [10th ed.]). I hope to show, presently, it is not in the power of the legislature to confer jurisdiction on a surrogate over the estate of a living person.

In the case at bar, the parties not being dead, all the proceedings were totally void, and consequently the payment to an executor or administrator appointed where the supposed testator or intestate is alive, would not be a discharge of the debt.

I think it may well be conceded that, upon evidence being furnished, according to the rules and principles of evidence and law, establishing the fact of death and of intestacy, the surrogate would be bound to issue letters, but this is done at the peril of the applicant, in case death should not in fact have occurred. But, as already shown, a compliance with such duties never, by the statutes of this state, give him jurisdiction when the supposed intestate or testator was in actual being. The surrogate must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. Yet, if he decides that the person, on whose estate he acts, is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator.

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The case is not within his jurisdiction (*Griffiths* agt. *Frazier*, 8 *Cranch*, p. 9; *opinion of* MARSHALL, C. J.).

The defendant's counsel's position is, that admitting there are dicta in the books to the effect that administration granted during the lifetime of a person upon his estate, because the ecclesiastical courts have jurisdiction only on the estate of dead persons (*Allen* agt. *Dundas*, 3 *T. R.*, 125; *Griffiths* agt. *Frazier*, 8 *Cranch*, 24), yet they do not override the statute of New York, which provides for a judicial inquiry into the fact of death, and that there is no New York case which decides otherwise.

I think the assertion too broad and not well considered. The third and fifth sections of chapter 79 of the Laws of 1813 (*Laws of 1813*, p. 445) are analogous to those before-cited. Section 5 of the act of 1813 is, in substance, the same as section 26 of Revised Statutes; in fact, the act of 1813 goes further than the Revised Statutes, for it requires in express terms that satisfactory proof shall be made of the death of the party as well that he died intestate, while the Revised Statutes does not require proof of the death of the party, except as going to establish the fact required to be proved, that is, that the party died intestate.

The court of appeals held, in *Sheldon* agt. *Wright* (5 *N. Y.*, p. 497 and pp. 510-512), that the provision in section 5 of the act of 1813 was merely directory, and did not effect the surrogate's jurisdiction; but that his jurisdiction depended on the actual existence in fact—first, on the death of the person, and second, that at his death he was an inhabitant of the county in which the surrogate who issued the letters was empowered to act. It clearly appears, by reference to sections 3 and 5 of the act of 1813, that upon the existence of the above two facts, the same surrogate who would, in case there was no will, have power to grant letters of administration, would, if there was a will, have power to probate it and issue letters testamentary thereon. In *Sheldon* agt. *Wright*, the non-existence of a will is not put as one of

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the facts on the actual existence of which the jurisdiction to issue letters of administration depends; and the actual existence of the will is not one of the facts on which the jurisdiction to admit a paper, purporting to be a will to probate, and to issue letters testamentary thereon depends. If either one of the above two matters does not actually exist as matters of fact, the surrogate is without jurisdiction, while if both do exist as matters of fact, the same surrogate has complete jurisdiction over the whole subject, either to grant letters of administration, or letters testamentary, as the case may require; and his action in granting one or the other could not be attacked for want of jurisdiction, but could be reversed or modified only by a court of review, or in pursuance of some statutory remedy. See discussion of the case of *Sheldon agt. Wright*, by the learned judge, in *Bolton agt. Jacks* (6 *Robertson*, pp. 221, 222). The above provisions of the Revised Statutes did not cover the case of a will, but the act of 1837 did, and the two together give to the surrogate precisely the same jurisdiction as the act of 1813, with but one substantial difference, viz.: The act of 1813 gives jurisdiction to grant letters of administration, admit wills to probate in certain cases when the decedent was not an inhabitant of this state. The additional clause in section 26 of Revised Statutes respecting the examination of a party on oath, and the subpoenaing and compelling the attendance of witnesses, are merely express enactments of power implied in the direction given by section 5 of the act of 1813, being necessary to a compliance with such direction (1 *Kent's Com.*, 525 [10th ed.]). The case of *Sheldon agt. Wright* seems to me to be an exposition of the law of this state on this subject and controlling over the case at bar.

At common law, administration granted upon the estate of a person in life was wholly void, even though granted by a court which had full power and jurisdiction over the granting of letters of administration (*Allen agt. Dundas*, 3 *T. R.*, 125; *Griffiths agt. Frazier*, 8 *Cranch*, p. 1; *Joachimssen agt.*

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Suffolk Savings Bank, 3 *Allen*, 87). The above and cases herein cited are directly in point. The case in 3 *Allen*, rests in its decision upon the principles of the English law, and does not depend upon any particular statute. The cases of *Carter* agt. *Buchanan* (2 *Kelly*, 337); *Noel* agt. *Wells* (1 *Levinz. S. R.*, 235); and *Prosser* agt. *Wagner* (1 *Com. B. [N. S.]*, 287) referred to by defendant's counsel, do not apply to the case at bar. The party whose will was offered for probate being conceded to be dead, the question whether the paper propounded was his will or not was the question which the court was authorized to determine.

It is difficult to break the force of the case of *Joachimsen* agt. *Suffolk Savings Bank* as bearing directly on the case at bar, and it furnishes a direct adjudication in favor of the the plaintiff's recovery.

Neither the legislature nor the courts have power to confer jurisdiction on surrogates over the estates of living persons. The foundation of the theory of distribution of estates whether under statutes of distribution or according to provisions of wills, rests upon the event of death.

"No person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." The substance of these provisions has been incorporated in all our state constitutions. They are simple and comprehensive, and I do not perceive that they derive any additional force or meaning by any historical review of the many learned disquisitions of jurists on the causes and sources of their origin. These provisions mean whenever the citizen acquires rights under the existing fundamental law there is no authority given to the law-making power to take them away. In this state, as in others, they are imposed as restraints upon the legislature, and whenever the rights of property are admitted to exist the legislature cannot say they shall exist no longer; nor will it make any difference even though a tribunal like the surrogate's court should be appointed to

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pronounce the judgment. BRONSON, C. J., in *Taylor agt. Porter* (4 Hill, 146) says: "It must be ascertained judicially that he (the citizen) has forfeited his privileges, or that some one else has a superior right to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation."

I cannot find any definition of property which does not include the power of disposition and sale as well as the right of private use and enjoyment. BLACKSTONE says (1 Com., 138): "The third absolute right of every Englishman is that of property, which consists in the free use and enjoyment and disposal of all his acquisitions without any control, diminution, save only by the laws of the land." Chancellor KENT says (2 Com., 320): "The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself;" and again (p. 326): "The power of alienation of property is a necessary incident to the right, and was dictated by mutual convenience and mutual wants."

The object of the constitution is not to grant legislative power, but to confine and restrain it. Without the constitutional limitation the power of the legislature to make laws would be absolute. It follows from these elementary principles that property is sacred and inviolable in the possession of living persons, and is equally so by transmission on their death whether by will or intestacy. The power of granting of probating or conferring any jurisdiction on the legislature over the estate of a living being comes within the constitutional prohibition and is absolutely void, and no act of the legislature can give it validity.

The plaintiff must have judgment for the amounts claimed in both cases and interest, with costs.

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COURT OF APPEALS.

THEODORE TILTON agt. HENRY WARD BEECHER.

Bill of particulars — case of crim. con.

The court of original jurisdiction has the power to grant a bill of particulars in an action of *crim. con.* if it sees fit to order particulars to be furnished.

And where it decides that it has not such power, it commits an error in law which requires this court to reverse its decision.

But whether in the exercise of its discretion it should grant or refuse the order for a bill of particulars, this court are not to decide.

ALLEN, J., *dissenting*. — Holding that in all cases where this court had reversed the orders of the court below and remitted the proceedings by reason of a supposed want of power, it appeared by the order and record of the court, that the decision of the court below was placed *exclusively* on the ground of a want of power. Here the motion was denied for want of power and for other reasons. The facts giving this court jurisdiction of the appeal must appear by the record; they do not so appear in this case.

December, 1874.

APPEAL from an order of the general term of the city court of Brooklyn, affirming an order of the special term of that court refusing to grant an order for a bill of particulars in this action.

William M. Evarts, for defendant, appellant.

Roger A. Pryor, for plaintiff, respondent.

RAPALLO, J. — There is no uncertainty or indefiniteness in respect to the nature of the charge made against the defendant. The difficulty under which he claims to be laboring is

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that the complaint does not point out the times or occasions when the alleged offenses are claimed to have been committed, but avers simply that they were committed on the 10th of October, 1868, and divers other days and times after that day and before the commencement of this action, thus covering a period of very nearly six years, the action having been commenced in August, 1874. He denies that the acts charged were ever committed, but claims that for the purpose of preparing his defense it is necessary that he should be furnished with the particulars of the time and place, in order that he may summon witnesses to rebut such evidence as may be brought against him or explain the circumstances which may be proved, and upon which the plaintiff may rely to establish the charges.

In action upon money demand, consisting of various items, a bill of particulars of the dates and description of the transactions out of which the indebtedness is claimed to have arisen is granted almost as a matter of course; and this proceeding is so common and familiar that when a bill of particulars is spoken of it is ordinarily understood as referring to particulars of that character. But it is an error to suppose that bills of particulars are confined to actions involving an account, or to actions for the recovery of money demands arising upon contract. A bill of particulars is appropriate in all descriptions of actions when the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put on trial with greater particularity than is required by the rule of pleading. They have been ordered in actions of libel: *Escape* — *Davis* agt. *Chapman* (*Adolph. & Ellis*, 767; 7 *Dowl. & R.*, 774); trespass — *Johnson* agt. *Birley* (5 *Barn. & Ald.*, 540); trover — *Humphrey* agt. *Cottleyou* (4 *Cow.*, 54); and in ejectment — *Vischer* agt. *Conant* (*id.*, 396). Even in criminal cases the instances in which the courts have, by analogy to the practice in civil actions, ordered bills of particulars are frequent, viz.: On an indictment for being a common barrator, where a general

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form of pleading is allowed (*Hawkins' P. C., B. c.*, 83, § 13; *Goddard agt. Smith*, 6 *Med. R.*, 261; *Commonwealth agt. Davis*, 11 *Pick.*, 432). On an indictment for nuisance, the prosecutor has been required to specify particulars of the separate acts of nuisance which he intended to prove (*Rev agt. Carwood, Add. & Ell.*, 815; *Regina agt. Flower*, 3 *Jurist*, 558), and in a prosecution of embezzlement (*Rev agt. Hodgson*, 3 *Carr. & Payne*, 300). And in England there is nothing more common, at the present day, than to order particulars to be filed in an action for divorce, either on the ground of cruelty or adultery; and this is done on the application of either the defendant, or, in cases where the wife is the defendant, of the person with whom she is alleged to have committed adultery, and who, under the statutes 20 and 21 Victoria, chapter 85, is joined with her as co-respondent for the purpose of being mulcted in damages. These cases show very clearly the opinion of the English courts, that a bill of particulars can be ordered in an action of *crim. con.*, because section 33 of the statute last referred to, expressly provides that where the alleged adulterer is named in the petition as co-respondent, the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations, as actions for criminal conversations are now tried and decided in courts of common law.

Under this provision particulars have been ordered on the application of the co-respondent as well as of the respondent (*Higgs agt. Higgs*, 11 *Weekly Rep.*, 154, and see *Hunt agt. Hunt & Duke*, 2 *Swab. & Trist.*, 574).

The cases in which the complainant has been required to furnish particulars, on the application of the respondent, are too numerous to justify their citation here. There are nearly a dozen of them in volumes 2 and 3 of Swaby & Tristram's Probate and Divorce Court Reports, which we have examined, and a similar order was made by the supreme court of Massachusetts, in 1834, in the case of *Adams agt. Adams* (16

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Pick., 254). In this state, chancellor WALWORTH, in the case of *Wood agt. Wood* (2 *Paige*, 198), laid down the rules which have since governed in actions between husband and wife for divorce, and rendered applications for bills of particulars unnecessary. It must be remembered that here, when the charge of adultery is denied, the issue must be tried by a jury, unless the parties consent to a different mode of trial, and it is even doubtful whether they should be permitted so to consent, but in a contested case the chancellor laid down the rule as follows:

“The only safe and prudent course is to require the charge, whether of crimination or recrimination, to be stated on the pleadings and in the issues, in such a manner that the adverse party may be prepared to meet it on the trial. If the persons with whom the adultery was committed are known, they must be named in the defendant’s answer, and the adultery must be charged with reasonable certainty as to time and place. If they are unknown, that fact should be stated in the answer and in the issue, and the time and circumstances under which the adultery was committed, should be set forth. Neither party has a right to make such a charge against the other on mere suspicion, relying upon being able to fish up testimony before the trial to support the allegation.”

The chancellor here speaks of setting forth the particulars in the answer because the case then before him was one of recrimination. In the case of *The Commonwealth agt. Snelling* (15 *Pick.*, 321) chief justice SHAW gave a very thorough examination to the subject of the practice of the courts of common law in requiring bills of particulars, and the principle upon which it is founded, and, after an extensive review of the authorities, came to the conclusion that the general rule to be extracted from them was, that where, in the course of a suit, from any cause, a party was placed in such a situation that justice could not be done at the trial without the aid of the information to be obtained by means of a specification or bill of particulars, the court, in virtue of its gen-

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eral authority to regulate the conduct of trials, had power to direct such information to be seasonably furnished. The authorities cited by him are decisions in civil cases; but by analogy he applied the principle to a criminal prosecution for libel, and sustained an order requiring the prisoner to furnish particulars of his justification of a general libelous charge against the magistrate.

The same rule is laid down in a recent case in the court of queen's bench in Ireland (*Early agt. Smith, Oyes. Com. Law R., Appendix, 35*), where it was held on the authority of many of the same decisions which are cited by chief justice SHAW, that the rules which governs the courts in ordering particulars to be given is, that in all cases, whether trespass, trover, or on the case, the court has a general superintending power and control, no matter what the form of the action may be. If this complaint or declaration is conceived in vague and general terms, without specifying the circumstances under or the occasions on which the plaintiff relies, and the defendant satisfies the court, by affidavit, that, either for the purpose of pleading or of defense, at the trial, it is necessary that the plaintiff be more specific, and more clearly define his cause of action, the court has a general jurisdiction to order the plaintiff to give a more precise and specific description of that upon which he relies. In the case last cited a bill of particulars was ordered in a case of oral slander. Although no precedent could be found for an order for particulars in such a case, the court determined that the circumstances presented to them brought the case by analogy within the reasons of those in which particulars had been ordered, and that, therefore, they were authorized to afford the relief required.

A reference to a few of the authorities upon which these decisions were founded will show that in almost every case in which the defendant can satisfy the court that it is necessary to a fair trial that he should be apprised beforehand of the particulars of the charge which he is expected to meet, the

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court has authority to compel the adverse party to specify these particulars so far as is in his power.

For instance, in *Doe agt. Phillips* (6 *Term Rep.*, 597), an action of ejectment was brought. It was made to appear to the court that the action was founded upon the alleged forfeiture of a term of a lease, by a breach of covenants contained in the lease. The court ordered the plaintiff to furnish particulars of the breaches of the covenants, of the times when, &c., he meant to insist that the defendant had forfeited the lease. To the same effect was the case of *Doe agt. Brood* (2 *Man. & Gr.*, 523), see in *Davies agt. Chapman* (6 *Adol. & Ell.*, 767), it was held that in an action for an escape the plaintiff might properly be ordered by a judge to give a particular of the alleged escape, specifying the time and place; and that the plaintiff is bound to specify them, precisely if he could, and if not, as well as he was able.

Analogous cases are to be found throughout the books of this state. It was long since recognized that in actions of ejectment, to ascertain the precise premises for which the plaintiff was proceeding, the constant course was to obtain a bill of particulars (*Vischer agt. Conant*, 4 *Cow.*, 396), and so in actions of trover (*Humphrey agt. Cottleyou*, 4 *Cow.*, 54). As I have already shown, there is no class of cases in which, in England, even at the present day, it is more common to order particulars to be furnished than in actions in which adultery is charged. If the charge is general and vague, particulars are always ordered. As early as the year 1692, in the case of the proceeding for divorce against the Duchess of Norfolk, before the house of lords of England (*reported in 8 Hargrave's State Trials*, 35; and *Howell's State Trials*, vol. 12, p. 833), the duchess demanded particulars of the charge against her. They were ordered. The complaint furnished a statement that the person charged to have committed the crime with the duchess was John Germaine, of, &c., and that the times were between the months of June and December, 1685, and several times

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since, specifying places. The petition of her husband was presented in 1692. To this charge, covering six years, she answered that the charge as to time and place was too general and did not answer the end of the order of the house of lords. A further and more definite bill of particulars was then furnished; affording the complainant an extensive field for proof, but at the same time indicating to defendant the periods and occasions in respect to which she was called upon to defend herself.

Without following the line of English decisions, I come at once to those of our courts in Pennsylvania, as early as 1784. In the case of *Steele* agt. *Steele* (1 *Dall.*, 49), after issue was joined in an action for divorce for cruelty, the court held that notice ought to be given of the facts intended to be proved under the general allegations of the libel. In 1805, in *Garraay* agt. *Garraay* (4 *Yates*, 244), the libel charged that the respondent, on the 10th of June, 1799, at the county aforesaid, and at other times and places, committed adultery with Esther Palmer, and other lewd women, to the plaintiff unknown; and the court held that unless the complainant, before trial, specified, in a written notice, the time and places and attendant circumstances, she should be confined in the evidence to acts of adultery committed with Esther Palmer. In Massachusetts, in 1834, in the case of *Adams* agt. *Adams* (16 *Peck*, 254), the libel for divorce charged acts of adultery generally, and a bill of particulars was ordered. Most of the authorities which I have mentioned consist of adjudications prior to the amendment of 1849 to section 158 of the Code of Procedure, which is in these words: "And the court may, in all cases, order a bill of particulars of the claim of either party, to be furnished."

It must be borne in mind that we are discussing simply a question of power, whether in the case before us the court below had power to order particulars to be furnished; not whether upon the facts disclosed by the affidavits, the court below ought or ought not to have ordered particulars, but

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whether it had the power to so do.' If it made a mistake in that respect we must correct it. If the Code had been silent upon the subject of bills of particulars, section 469 would probably have sufficed if necessary to prove that he confessed the acts to have been committed at the dates specified in the bill of particulars. This is an imaginary difficulty. It would be absurd to suppose that any tribunal of ordinary intelligence would order a bill of particulars in such form as to exclude evidence of general confessions. The same argument is in the case of *Codrington agt. Codrington (Andrews, 2 Swab. & Trist., 368)*. After an order for particulars had been granted, the complainant delivered particulars in which he alleged that the respondent had committed frequent acts of adultery between 1859 and 1862, with one Lieutenant Mildmay, at Malta, and during a journey in Switzerland, Savoy, Sardinia and Italy. Application was made for further particulars, and it appearing that the charge was founded upon the contents of a diary and letters of the respondent which had come to the petitioner's hands, it was ordered that unless the petitioner gave further particulars, he should be confined in his proof to the confessions contained in the diary and letters.

It is further urged that the defendant, in such a case, needs no specification of particulars, because he knows better than any other, but one, the details about which he seeks information. This is *petitio principii*, it assumes that the defendant has committed the acts with which he is charged, while the very question to be tried is whether or not he has committed them.

A further argument is, that to make the disclosures sought will afford the defendant an opportunity to tamper with the plaintiff's witnesses. This argument has been used in many of the cases to which I have referred, and has been uniformly rejected. The principle upon which orders for particulars are granted, is the advancement of justice and preventing of surprise at the trial. The court must see that both parties

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are fairly dealt with; and it cannot be presumed that it will make any order which shall shield the defendant from just responsibility.

Whether in the exercise of its discretion it should grant or refuse the order applied for we are not to decide. All that we decide is that it has the power, if it sees fit, to order particulars to be furnished, and that in deciding that it had not such power it committed an error in law which requires us to reverse its decision.

A point is made on the part of the plaintiff which requires notice. It is contended that the general term, in affirming the order of the special term, must be presumed to have passed upon the merits of the facts as well as upon the law of the case; and the decision in *Tracy agt. Altemeyer* (46 *N. Y.*, 598) is cited in support of this point. The answer is that in the present case it appears that the orders of the special term were reviewed by only two judges of the court; that they were divided in opinion, and that it was only by force of the statute specially applicable to the city court of Brooklyn (*Laws of 1870, page 1047, § 6*); that the order stood as affirmed, the two judges disagreeing.

Our conclusion is, that the orders of the special and general terms of the city court of Brooklyn be reversed, without costs, and the case remitted; to be heard at special term; that its discretion may be exercised upon the merits.

CHURCH, Ch. J., and FOLGER and ANDREWS, JJ., concur.

ALLEN, J., *dissenting*. — If the court below had not the power to grant the motion, the order should be affirmed. If the power existed, its exercise was in the discretion of the city court of Brooklyn; and the action of that court in the exercise of that discretion is not the subject of review in this court. In one or more cases in which we have thought the court of original jurisdiction had erred in refusing to act by reason of a supposed want of power, we have reversed the orders and remitted the

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proceedings, to the end that the proper court might exercise the discretion the law had vested in it. In these cases it appeared, by the order and record of the court, that the decision of the court below was placed exclusively on the ground of a want of power. Here we have not the record evidence. The motion at special term was denied for want of power and for other reasons stated; showing conclusively that the relief was not denied solely upon the ground that the court had no power to grant it. The clear inference from the terms of the order is, that the judge doubted whether the court had power to order the information to be furnished; but if it had the power, a proper case had not been made for the exercise of the power. If the opinion is referred to, the same conclusion will be arrived at. The judge had evidently great doubts, and inclined to the opinion that there was a want of power, but was also of opinion that it was not a proper case for the relief if the power existed. The order at the general term surely affirms the order without assigning or declaring the reasons; and we must assume that it was affirmed on the merits, it not appearing that it was affirmed for any other reason. If the fact be that it was affirmed under the statute, by a divided court, which is not stated in the order, the result would be the same. The facts giving this court jurisdiction of the appeal must appear by the record. They do not so appear in the case. I am for the dismissal of the appeal.

Judge GROVER doubts the existence of the power, but concurs in the opinion of judge ALLEN.

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SUPREME COURT.

MICHAEL MAHONEY, plaintiff in error, agt. THE PEOPLE, &c.,
defendants in error.

Force necessary to constitute robbery in the first degree — sufficiency of bill of exceptions.

The amount and degree of violence which must be exerted by a prisoner, to bring him within the statute defining robbery in the first degree is not declared, and manifestly could not be. The gravamen of the crime, as declared by the statute, consists in taking "the personal property of another from his person, or in his presence, and against his will, by violence to his person, or by putting such person in fear of some immediate injury to his person."

It is not the extent and degree of force which makes the crime, but the success thereof. In short, the force which is sufficient to take the property against the owner's will is all that the statute contemplates.

The distinction between robbery and larceny consists in this: In the latter, the act "is accomplished secretly, or by surprise or fraud;" while in the former, the felonious taking must be "accompanied by circumstances of violence, threats or terror to the person despoiled."

Where the prisoner, on exceptions, objects to the charge of the court to the jury on the trial, that if they believed the truth of the evidence of the complainant hereinbefore detailed, then the prisoner was guilty of robbery in the first degree as charged (and not merely guilty of larceny from the person); and if the bill of exceptions is so drawn as not to show to this court all the evidence of violence upon which the court and jury acted, it cannot prevail. The error does not affirmatively appear.

It is an elementary principle that in the absence of all the evidence given upon the trial, the appellate court will assume, when the question is upon the sufficiency of the evidence, that that which is not returned to it, warranted the ruling, and justified the verdict.

General Term, First Department, December, 1874.

On the 14th day of April, 1873, the plaintiff in error, at a court of general sessions of the peace of the city and county

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of New York, held in the city of New York, before Hon. John K. Hackett, recorder of the said city, was convicted of the crime of robbery in the first degree, and sentenced to the state prison for twenty years. The case was removed to this court by writ of error.

John O. Mott, for plaintiff in error.

Benjamin K. Phelps, for defendant in error.

WESTBROOK, J.—On the 5th day of April, 1873, upon “a somewhat rainy night,” about the hour of ten and a half o’clock, one Peter R. Corson, who was on his way to his residence, at No. 319 East Twentieth street, in the city of New York, from Barnum’s museum, having hold of his boy with one hand and an umbrella in the other, was, immediately on stepping upon the platform of a Third avenue car, robbed of his pocket-book and contents by the prisoner.

The questions, which the counsel for the plaintiff in error presents, are, was the crime committed, that of which he was found guilty, to wit:—robbery in the first degree—or was it simply larceny from the person?

The prisoner’s counsel upon the trial conceded “that his client was guilty of the grand larceny in having feloniously taken the complainant’s property from his possession,” but insisted “that it was unaccompanied by violence within the meaning and comprehension of the statute.” The recorder, after reading to the jury our statute, which defines the crime of robbery in the first degree, left to them the question of the truth of the story of the complainant, and added: “If you believe his statement, with reference to the occurrence, to be true, I charge you, that the force used by the prisoner, is that character of violence comprehended by the statute. The statute does not define the character or characters of the force or injury that must be used to constitute one of the elements of robbery in the first degree. It nowhere says, that a person

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shall be knocked down and beaten senseless, before the assailant can come within its comprehension ; but I charge you, if you believe Mr. Corson's statement to be true, that the prisoner put his arm around his neck, and violently and forcibly, then and there, jerked his head back in the manner that he described that he did, and forcibly and feloniously took from his person his pocket-book and money, that it was a robbery with felonious intent, and accompanied by violence."

Various exceptions taken by the prisoner's counsel to this charge present this question : Considering the truth of Mr. Corson's evidence, is the prisoner guilty of the crime whereof he stands convicted ?

The narration of the occurrence by the complainant is as follows : " I stepped on and made an effort to get into the car ; there was a very large man stood right in the front door of the car, holding me back ; that man (the prisoner) came and put his arm around my neck, pulled upon me, pulled up my head so (showing), and I had this arm — my left arm — kind of up, and then he pulled me two or three times ; said I, ' What are you doing ? ' Said he, ' I want to get that lady in. ' I saw no lady. * * * Well, perhaps, in less than one-tenth part of the time I have been stating it, he stepped off ; I felt his hand come out of my pocket. Q. (By the court.) What did he do to your neck ; put your head up ? A. Yes, sir ; and pulled back with his left arm. Q. (By the assistant district attorney.) Where did he stand then ; behind you ? A. He stood rather in front of me ; that way (showing) ; I stood this way ; he stood in front of me, reaching around ; the other man stood here, crowding me against the door. " The witness then described the contents of his pocket-book, and said that he felt for and missed it as soon as the prisoner withdrew his hand. On his cross-examination the witness further testified : " Q. How did he put his arm around your neck ; was he pushing you one side ? A. No ; he was pulling me to him. Q. Where was he ; in what position of the car ; was he next to the driver, or where ? A. He was just inside, on

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the edge like that, you know ; I stood right here ; he reached in and got his hand around my neck, and pulled me to him, pulling me out, pulling me up in front, up so, you know ; I stood here. Q. You asked him what he was doing? A. Yes, sir. Q. Did he hurt you? A. He did not hurt me particularly ; he gave me a pretty good jerk."

The foregoing is all the evidence given upon the trial showing the violence used, and our statute governing the case is as follows: "Every person who shall be convicted of feloniously taking the personal property of another from his person, or in his presence and against his will, by violence to his person, or by putting such person in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree" (2 *R. S.*, p. 697, § 55, *Edm. edition*).

In discussing the point made by the prisoner's counsel, that the recorder erred in instructing the jury that, if they believed the truth of the evidence of the complainant hereinbefore detailed, then the prisoner was guilty of the offense defined in the statute just quoted, it is apparent that it is liable to the fatal objection that the error does not affirmatively appear; because the bill of exceptions is so drawn as not to show to this court all the evidence of violence upon which the court and jury acted. It is an elementary principle that in the absence of all the evidence given upon the trial the appellate court will assume, when the question is upon the sufficiency of the evidence, that that which is not returned to it warranted the ruling and justified the verdict. Upon the trial of this indictment not only did the complainant undertake to describe the illegal robbery by words but by acts, he exhibiting to the jury by physical action the mode and manner thereof. That description which the court and jury, by and before which the prisoner was tried, saw, and from seeing which, a correct idea of the force and violence used in perpetrating the theft can alone be formed, this court cannot see, and because it cannot, it is unable to say, and cannot say that the recorder erred in his charge. On the con-

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trary, upon the well known rule to which we have alluded, that the tribunal whose proceeding is reviewed is presumed to have decided rightly, unless the error affirmatively appears, this court must assume that the representation, by action, of the force used in the perpetration of the crime, and which it is impossible for us to learn from the bill of exceptions, sufficiently proved to it, that the prisoner used violence enough to bring him within the statute. For this reason, alone, the conviction should be affirmed.

But it also seems to us that the violence which the words proved was sufficient to justify the charge. The amount and degree of violence which the accused must exert to bring him within the statute defining robbery is not declared, and it manifestly could not be. The gravamen of the crime consists in taking "the personal property of another from his person, or in his presence, and against his will, by violence to his person, or by putting such person in fear of some immediate injury to his person." In other words, the violence to the person, or the fear of immediate injury to the person, which, against the owner's will, is sufficient to take his property, will, if the taking be felonious, render the taker amenable to the statute. It is not the extent and degree of force which make the crime, but the success thereof. In short the force which is sufficient to take the property against the owner's will, is all that the statute contemplates—the distinction between robbery and larceny consisting in this: in the latter the act "is accomplished secretly, or by surprise or fraud," while, in the former the felonious taking must "be accompanied by circumstances of violence, threats, or terror, to the person despoiled" (2 *East's Pleas of the Crown*, 552).

In the case before us the accomplice of the prisoner crowds the complainant against the door of the car, whilst the accused throws his arm around the prosecutor's neck, pulls him toward him, and then rifles his pocket. If this statement be true it amply justified the charge, for, whether the force gave pain or not, it accomplished the theft; and by

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it, and it alone, Mr. Corson was feloniously deprived of his property against his will, though conscious of the act and trying to prevent it.

The books contain many cases of convictions of the crime of robbery, where the force employed was evidently no greater than in this. With the citation of one very similar we end the discussion. In *Commonwealth agt. Snelling* (4 *Binney*, 379) "a special verdict found that the prisoner took the prosecutor by the cravat, with an intention to steal his watch, and also pressed his breast against the prosecutor's and held him against the wall, during which he took the prosecutor's watch from his fob without his knowing it; and the prosecutor had no idea that he meant to rob him, but was afraid he meant to whip him. This was held to be robbery" (*Cited from 2 Wharton's Criminal Law* [7th edition], section 1701).

The principle which the case just cited determines is this: That when force is employed to divert the owner's attention, whilst he is unconsciously deprived of his property, the taker is guilty of robbery, though by means of the force which distracts the attention, the larceny is artfully and unknown to the owner completed. This is sound sense and good law. The force strategically employed so as to deceive an opposing commander as to the real object, whilst the latter is stealthily but successfully pursued, is that which wins the battle, though employed by indirection to accomplish the result. And the force which a thief uses to and upon the person of his victim to consummate a robbery, if successful, is as much the successful force which robs, when exerted to bewilder and confuse, as when used and exerted directly upon the main object. In either the taking would be the result of force, though in the one case indirectly applied, and in the other directly.

In the case before us the most that could be said in favor of the prisoner is, that his confederate and he used force to distract Mr. Corson's attention whilst his pocket was picked.

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Unlike the Pennsylvania case, however, the hand which grasped the pocket-book was felt, and the theft discovered. The force, however, was, in both cases — to give the most favorable construction to the prisoner of the evidence — used for the same purpose ; and if thus employed in the one case it was robbery, it was equally so in the other.

The result of our examination is, that the conviction and judgment in this case must be affirmed.

DAVIS, P. J., concurred.

Holbrook agt. Brennan.

N. Y. COMMON PLEAS.

FRANCIS W. HOLBROOK, appellant, agt. MATTHEW T. BRENNAN,
Sheriff, respondent.

Exception to sureties in undertaking.

On appeal from the general term of the marine court to this court, the undertaking required should be according to sections 354 and 356 of the Code.

At a special term of the court of common pleas of the city and county of New York, held at the County Court-house, New York city, December 31, 1874.

Present — Hon. CHAS. P. DALY, Chief Judge.

A motion herein founded on affidavit of Charles H. Smith, Jr., and order to show cause why an order should not be made adjudging irregular and void the respondent's notice of exception to the surety, and form of undertaking given pursuant to sections 354 and 356 of the Code, by the appellant herein on appeal to this court from the judgment rendered at the general term of the marine court of the city of New York, upon the grounds that the same is contrary to the practice of this court and is not sustained by the provisions of the Code, and to stay all proceedings upon and pursuant to such notice.

After hearing *Charles H. Smith, Jr.*, for appellant, in support of the motion, who cited Code, sections 354 and 356, *McAdam's Pr.*, 277, and *H. W. Bookstaver*, for respondent, in opposition, who cited Laws of 1872, chapter 629, and Laws of 1874, chapter 545, it is ordered that the motion be granted.

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SUPREME COURT.

THE INDIANAPOLIS, PERU AND CHICAGO RAILROAD COMPANY
agt. THOMAS M. TYNG.*What false representations made will justify a recovery therefor.*

It is now settled by the court of appeals that an action, founded upon the deceit and fraud of the defendant, cannot be maintained in the absence of proof that the defendant believed, or had reason to believe, at the time he made them, that the representations made by him were false, and for that reason fraudulently made, or unless it be shown that he assumed or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge. Although the rule declared in *Bennett agt. Judson* (21 N. Y., 238) that one who, without knowledge of its truth or falsity, makes a material misrepresentation, is guilty of fraud in legal contemplation as much as if he knew it to be untrue, is qualified but not overruled, the injured party is not compelled to prove that the person making the representations knew them to be false; if he assumes or intends to convey the impression that he has actual knowledge of their truth, when conscious that he has not such knowledge, it is enough.

The impressive array of facts in this case would seem to be quite conclusive upon the correctness of the findings of the referee charging the defendant with having made false representations, and for an improper purpose.

General Term, First Department, October, 1874.

BRADY, J. — This is an appeal from a judgment entered upon the report of judge SUTHERLAND as a referee. The following statement by the respondent's counsel, of the averments in the pleadings and of the facts established on the trial, is adopted as a correct exposition of the material facts.

"The complaint charged that, by false representations, the defendant induced the plaintiffs to purchase, through his

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instrumentality, two locomotives, called the 'Maryland' and 'Waterford,' at \$26,000, as the lowest attainable price, and for that purpose obtained from the plaintiffs the \$26,000, and also \$500, as a compensation for himself, when, in truth, the undisclosed vendors of the locomotives sold them for not over \$20,000, and the plaintiffs were thus defrauded out of at least \$6,500 in cost of the locomotives. And as a second cause of action, the complaint further charged, that the defendant, as an inducement to the plaintiffs to be purchasers of the two locomotives (which were at a distant place and not seen by the plaintiffs), also misrepresented, or caused to be misrepresented, their character and condition; that, having thus secured the plaintiffs as purchasers at \$26,000, the defendant, instead of disclosing the names of the true vendors, signed a bill of sale, in which he incorporated the false description, at the same time asking and obtaining from the plaintiffs, as a compensation for his service in effecting the purchase, \$500; that the locomotives did not answer to the description, and were comparatively worthless; and that, by means of the fraudulent representations and warranty of the defendant, the plaintiffs were defrauded of \$17,000.

"The answer denied the fraud, disavowed responsibility for the condition or character of the locomotives, and asserted for the defendant the position of vendor at \$26,500, with the right to gain and retain whatever profit there might be between that and the true price.

"By the report of the referee it was found that the defendant defrauded the plaintiffs in respect both of the price and of the description, condition and value of the locomotives, and thereby caused a loss to the plaintiffs of \$14,000 (\$6,000 in price, and an additional \$8,000 in value), for which sum, with interest and costs, judgment was directed and entered.

"The plaintiffs' company and railroad was in Indiana. The locomotives were at a machine shop in Lowell, Massachusetts. The transactions with the defendant for the purchase were at New York, and in them the plaintiffs were represented by the

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late Mr. Francis B. Cutting, who was vice-president of the company, and owned a large interest in it. The testimony of Mr. Cutting was not contradicted by the defendant, who did not take the stand as a witness, and there was no conflict of evidence respecting the facts and circumstances of the purchase.

"The defendant, as a dealer in railway supplies, became known to Mr. Cutting through an advertisement, in October, 1864. He contracted for the sale to Mr. Cutting, at \$16,500, of a second-hand engine (the Gazelle), which he was to put in a specified condition within forty or sixty days. To superintend the repairs, then in progress at Jersey City, Mr. Cutting employed one Levi P. Bissel, an engineer, recommended to him for that purpose. Shortly afterward, the defendant, pleading that fulfillment of the contract (under inspection) would produce heavy loss to him, persuaded Mr. Cutting to forego the benefit of the contract and cancel it, upon receipt of \$1,000, to cover the expenses already incurred by plaintiffs by reason of it. This was the first transaction and acquaintance between Mr. Cutting and the defendant, or Bissel. Mr. Cutting subsequently gave an invitation to the defendant to 'find an engine about the size and form of the Gazelle.'

"Accordingly, on the 5th or 6th January, 1865, the defendant called upon Mr. Cutting, with something that would 'just suit' him, and stated to him that there were at Lowell some second-hand engines, ready for delivery, which 'had been thoroughly repaired and could be bought cheap.' He produced two sets of specifications, one of a large engine, and one of two smaller engines, and stated that Bissel 'had examined those two engines, with the specifications, and that he would send Bissel to him.' On the same day, Bissel having been sent by the defendant to Mr. Cutting, represented to him that he had examined the engines, and professing to give in detail the results of such an examination, he recommended the two small engines, and represented that they

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agreed with the specifications in all respects (except the thickness of tire), and that 'they were good, serviceable engines, and cheap at the price.' Mr. Cutting telegraphed to the president of the company and received a reply.

"On Monday, 9th January, 1865, Mr. Cutting saw the defendant at his office, and showed him the telegram. The defendant, after ascertaining what would be Kasson's charge for forwarding, asked from Mr. Cutting permission to telegraph parties in Boston 'for one of those engines, one of the \$14,000 engines,' and upon Mr. Cutting's saying he might telegraph an offer of \$13,500 for one of them, the defendant said to him. 'You will stand a better chance to get them if you will authorize me to offer \$26,000 for the two.' After some hesitation, Mr. Cutting consented that he might 'send the telegram, and offer them \$26,000 for the two engines,' and the defendant undertook to do so. On this occasion the defendant wrote and procured from Mr. Cutting the two papers of that date, manifestly intended as mere authentications of Mr. Cutting's offers, to unknown vendors, through the defendant. They had passed from Mr. Cutting's recollection, but were taken by defendant 'to show that he was authorized to buy' and confirm the accuracy, even in detail, of his testimony, one of the papers being an offer for one of the engines, in accordance with his first proposal, and the other being the final offer of \$26,000 for the two, as authorized by Mr. Cutting, upon the persuasion of the defendant, in view of the difficulty assumed by him in obtaining one at that rate.

"On the 11th January, 1865, the defendant came to Mr. Cutting's office, and represented to him that there had been such delay and unsatisfactoriness in making the purchase by telegraph, that he had himself 'gone to Boston and seen the parties, and that they accepted his (Mr. Cutting's) offer of \$26,000 for the two engines.' Not knowing who were the vendors, nor anything except from the representations of the defendant and Bissel, respecting the engines, Mr. Cutting

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said to the defendant that he should have a guarantee that 'these engines are equal to the specifications.' To which the defendant replied, that 'he knew the parties and would give the guarantee,' and he was advised by Mr. Cutting that, in that case 'he had better take from them a counter-engagement to keep him right.' The defendant undertook to prepare such a guarantee, and for that purpose obtained back from Mr. Cutting his description of the engines. It was also arranged that payment should be made on production of Kasson & Co.'s forwarding receipt, and of this date is the certificate, procured from Mr. Cutting by defendant, authenticating his power to complete the purchase from the undisclosed vendors. That such was its purpose appears, not only by the testimony of Mr. Cutting, but by the certification of Mr. Cutting's signature by John Parker, cashier of the Phenix Bank.

"A day or two afterward, the defendant reported that there was still delay — 'he did not know exactly what' — and proposed to go on to Boston and see what was the cause of it; and, in view of the trouble he was taking in Mr. Cutting's behalf, said, 'although the purchaser is not bound to pay the broker any commission, yet, in this case, I think I have the right to appeal to your liberality in the matter.' In response to which appeal, Mr. Cutting consented to allow him a commission of \$500.

"The defendant also explained that, in order to enable him to complete the purchase and settle with the vendors in Boston, he would need to 'have some authority from you to show them that he was entitled to draw.' Accordingly, the defendant wrote an authority to draw, which was dated and signed by Mr. Cutting, the amount of the commission being included, so that there would be but one transaction. Shortly afterward, the proposed guarantee or bill of sale was shown by defendant to Mr. Cutting, who glanced at it, and asked if the specification was correctly embodied. The defendant assured him that it was, and took it and the authority away.

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"On the 18th January, 1865, the defendant telegraphed from Boston that he had drawn for the amount; but no such draft was presented or, in fact, drawn; and, on the next day, nineteenth January, the defendant called upon Mr. Cutting in New York, and stated that, 'instead of drawing upon him, he had arranged with the parties in Boston to give his own check on the Phenix bank; that he had given them his own check, and wanted Mr. Cutting to give him a check for like amount, to make his good.' Thereupon, Mr. Cutting gave to the defendant his check for \$26,500, which was duly paid, and received from him Kasson's receipt and the receipted bill for \$26,000 purchase-money and \$500 commission, and the bill of sale, dated back by defendant to January 11, 1865, and the unused authority to draw; and thus the purchase of the engines was consummated.

"Kasson & Co. forwarded the engines from Lowell to their destination — Peru, Indiana; but were obliged to notify Mr. Cutting of difficulties in running them on with merely their own bulk and weight to transport.

"They had to be taken into machine shops, and the question, referred by them to Mr. Cutting, and by him to the defendant, was, whether to repair the engines at Buffalo or forward them, as they best could, without repair. With the concurrence of defendant, they were forwarded.

"When at last the engines reached the plaintiffs, in Indiana, their true character and condition were discovered by the plaintiffs, who forwarded to Mr. Cutting reports of officers and machinists by whom they were examined at Peru. These reports pronounced the engines, in general and in detail, to have been falsely described to Mr. Cutting, and a fraud upon him and the company, and of no value except by weight as old iron.

"After receiving these reports, in February, 1865, Mr. Cutting communicated them to the defendant, who thought 'Mr. Gilman must be mistaken,' but finally conceded that he was probably not mistaken in such facts as that there were 109

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brass tubes instead of 136 copper ones. Mr. Cutting thought it a matter 'he ought to look into,' and suggested that the defendant should personally, or otherwise, test the accuracy of the reports; but the defendant 'had not time;' and, upon being reminded of his guarantee, informed Mr. Cutting that what 'he guaranteed was that these engines were the same, and in the same condition as when examined by Bissel.' Mr. Cutting declined to then discuss the question of construction, and renewed the suggestion as a matter of reputation and good morals, that the defendant should give some attention to the reports. The defendant did not acquiesce; neither did he give any trace of his authority for his specifications, except that it was 'parties in Boston,' and not Bissel, whom, however, he again 'sent around to see him.'

"Bissel finally confessed, in substance, that his former report of having made an actual, detailed examination, was untrue; and he now asserted, as authority for its details, hearsay statements of a man who showed him the engines, instead of such an examination. Upon Mr. Cutting's suggestion that, in view of the 'great difference between Gilman's reports and his own reports,' he had better go out to Indiana; of which Mr. Cutting offered to pay half the expense if the defendant would pay the other half, he promised to submit the offer to the defendant, but he did not return, and was not again seen by Mr. Cutting.

"These developments evidently inducing Mr. Cutting to suspect that there might also have been fraud in the price, he, at the interview with the defendant, asked him 'a little abruptly,' who was the owner of the engines. The defendant 'hesitated a little while and answered, Samuel B. Allen, of Boston.' Mr. Cutting asked, 'Did you pay \$26,000 for those engines?' Said he, 'No, I paid \$24,500 for them.' Mr. Cutting asked, 'Did you get a commission of me of \$500 and make me pay \$26,000 for engines you had agreed to buy for \$24,500?' 'Oh,' said he, 'they cost me, with expenses, more than \$24,500.' And to the question, 'What expenses?'

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he hesitated, and finally said that 'the engines had cost \$24,000 or \$25,000, or something; I think \$24,750, or something—an additional sum.' To the question, 'What became of the difference?' he said, 'The difference between what Mr. Cutting had paid and what the owner had sold them for amounted to about \$1,500, and had been divided between the agents in Boston, Whitney, Bridges & Stearns (brokers like the defendant) and the defendant, each taking one-half.' To the question, 'Why did you charge me a commission for doing this?' the defendant answered, that at the time the commission was asked and granted 'the price was \$26,000, but afterward, Whitney, Bridges & Stearns had induced the owners to throw off \$1,500 from the price.'

"These statements of the defendant proved also to be untrue. The owners of the engines had been seeking to sell them at \$20,000 from as far back as the previous November; and before Bissel was first sent to Mr. Cutting by defendant he was advised of the anxiety to sell. The owners, in fact, received only the \$20,000, less \$500 commission, deducted by Whitney, Bridges & Stearns, their Boston brokers.

"When asked by Mr. Cutting why he did not tell the truth when he rendered and receipted his bill for the \$26,000 purchase-money and \$500 commission, the defendant replied that 'nine out of ten men would have done the same thing;' to which Mr. Cutting responded with the regret that the defendant was 'one of the nine.'

"The further narrative of Mr. Cutting is but confirmatory of the foregoing summary. He again, unsuccessfully, urged the defendant to give attention to the matter as 'of importance, involving a good deal of character.' The defendant conceded that he had employed Bissel because he thought his 'favorable report of them (the engines) would induce him to buy them.' He took no counter-guarantee because he 'did not consider he was liable on that guarantee.' Mr. Cutting ascertained at the Phenix Bank that the true amount of the check given by the defendant at Boston was \$23,000 (against Mr.

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Cutting's check for \$26,000), and the payees were Whitney, Bridges & Stearns, the Boston brokers; and he wrote to the defendant the letter of 13th March, 1865, asking him to preserve it, receiving the reply that he would do so. There was some interposition of advice, given to the defendant by his counsel, Mr. Fithian, respecting the character in which he conducted the negotiation; but Mr. Cutting properly suggested to the defendant that if he proposed to be the real vendor, he should have told him, 'so as to put him on his guard — then we would have dealt equally.'

"The defendant also said that the specification was not in the handwriting of Whitney, Bridges & Stearns, but would not say in whose handwriting it was."

This is an impressive array of facts, and it would seem to be quite conclusive upon the correctness of the findings of the referee charging the defendant with having made false representations, and for an improper purpose. It is, nevertheless, asserted by his counsel that he cannot be held responsible; that he is not shown to have made them with knowledge that they were false and with intent to deceive, as required by law. These elements, he claims, are absent, and that such absence is fatal to the plaintiffs' recovery.

Whatever may have been the rule prior to that decision — however seemingly inconsistent with fair dealing and the right of the general reliance of men upon each other for honesty in their transactions one with the other — it was held in *Bennett agt. Judson* (21 *N. Y. Rep.*, 238) that one who, without knowledge of its truth or falsity, makes a material misrepresentation, is guilty of fraud in legal contemplation, as much as if he knew it to be untrue. Mr. Justice COMSTOCK, by whom the opinion of the court was written — all the judges concurring (except Mr. Justice SELDEN, who expressed no opinion) — said: "The question of law was whether the representations could be deemed fraudulent unless they were known to be false;" and thus, although the decision has been criticised, limited and finally qualified, the

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precise point stated was involved, and passed upon and settled. It had been discussed by the profession — but from a professional standpoint, only an authority — and the result of that case was satisfactory to them and to the common sense of the business people of the land. It was rare, indeed, to find an individual who hesitated to say at once, that the positive assertion of a material fact upon which another was induced to part from his property should be visited with the same consequences in regard to the transaction, if false, as if the person asserting it knew it to be so. It was a view in entire harmony with a principle of law, which should be universal, that he who unjustly deprives another of his property should be compelled to restore it or its equivalent. It was recognized as a sequence that when the injury was accomplished it was of no consequence to the victim whether his wrong-doer did the mischief knowingly or not. He knew that he could not do it innocently. Having made the assertion and induced reliance upon its truth, he could not in morals — and it would seem that he ought not in law — be permitted to say, "I did not make it knowing it to be false, or with an evil design or intent," and thus escape the responsibility which it created. "Whether a party," says justice STORY, "misrepresenting a material fact, know it to be false or make the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and in law, as unjustifiable as the affirmation of what is known to be false" (1 *Story Eq.*, 193, *j. note*). When a man asserts the existence of a fact it should be done either upon knowledge or upon circumstances which when grouped, would show it to be true, always maintaining the ability, for his own protection and for the justification of his own conduct, of proving it to be so. No man has the right to affirm to be true what he does not know to be so, either of his own knowledge or as the result of proper and impartial investigation, and therefore susceptible of proof. It cannot be denied that

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a departure from this rule of conduct has occasioned multitudes of wrongs in society for which no redress could be had, without reference to the numerous litigations to which it has given rise, the dishonest practices which it has inaugurated, and the destruction of private character which it has occasioned by the slanders which it has circulated. If the rule should ever be adopted in this state that no man shall respond in damages who utters a false affirmation unless he knows it to be false, or believes it to be so, and make it with intent to deceive, the legislature should be invoked to destroy it, and to declare what is consistent with good morals and fair dealing. It becomes necessary, therefore, to ascertain in this case the rule which now exists, to see how far the case of *Bennett agt. Judson* has been modified or limited, and whether or not it stands unimpaired. The result is as declared in the recent case of *Wakeman agt. Dalley* (in the 51 *N. Y. Rep.*, p. 27), and upon a review of the authorities, that an action founded upon the deceit and fraud of the defendant cannot be maintained in the absence of proof that the defendant believed, or had reason to believe, at the time he made them, that the representations made by him were false, and, for that reason, fraudulently made, or, unless it be shown that he assumed or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge. The rule thus declared is sustained by the following decisions: *Marsh agt. Falker* (40 *N. Y. Rep.*, 162); *Oberlander agt. Spiers* (45 *N. Y. Rep.*, 175); *Meyer agt. Amidon* (45 *N. Y. Rep.*, 169); *Hubbell agt. Meigs* (50 *N. Y. Rep.*, 480); *Degraw agt. Elmore* (50 *N. Y. Rep.*, 1); *Ross agt. Mather* (51 *N. Y. Rep.*, 108), and it is the law of this state. The doctrine of the case of *Bennett agt. Judson* is not therefore overruled, but modified. The facts in that case presented the question stated by Mr. Justice Comstock, fairly and decidedly. The representations were made in belief of their truth, and upon information relied upon.

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There was no pretense that there was knowledge or belief of their falsity by the defendant or his agent.

The case has sometimes been otherwise interpreted, but the converse of the view just expressed cannot well be maintained. The decision, however, is no longer the unqualified law of the land; and something more than a positive assertion, though false in fact, must be shown by evidence to justify a recovery. It must be proved that the defendant knew or believed the representations to be false, or that he assumed or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had not.

The court of appeals felt bound by the authorities thus to declare the doctrine. The decisions reviewed, made by the English courts, were to the same effect; but it must, nevertheless, be regretted that they felt obliged to follow them. It was only necessary to strike from the form of legal responsibility to be created the charge of fraudulent representation, if that were the objectionable element, and to hold that the statement made, being, in fact, false, and its utterance having occasioned injury to the person receiving and acting upon it, it was a subject for redress. "It should," in the language of Mr. Justice Comstock, "be declared that the law was not so unreasonable as to deny redress in such a case." It would be just to except from the operation of the rule stated, actions for deceit in representations of solvency, because it may be assumed that when information of that kind is sought it must necessarily partake of the character of information only, and not of knowledge, unless, by some special and particular phrase, it is intended to be otherwise; it is not ordinarily communicated or employed for personal gain or personal advantage, or for the purposes of barter between the seller and the person giving it. It thus, however, appears that although the rule declared in the case of *Bennett agt. Judson* is qualified, the injured party is not compelled to prove that the person making the representations knew them to be false; if he assumes or intends to convey

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the impression that he has actual knowledge of their truth, when conscious that he has not such knowledge, it is enough.

Judged by this standard, and after a careful examination and consideration of the evidence in this case, we feel obliged to say that there can be no well founded doubt of the justice of the referee's findings. We do not deem it necessary to express in detail the reasons for this result, but to refer to the facts recited as a complete answer to the assertion that the evidence given did not warrant them. The defendant was not examined on the trial, and we have not the benefit of any denials or explanations which he might have made or given, nor have we the testimony of Mr. Bissel, so closely identified with the transaction and with the defendant. The defendant has, it is true, invited by this appeal a discussion of the facts and circumstances disclosed, but, nevertheless, we shall content ourselves with this mode of dealing with them. It is quite apparent, from the facts established, that the defendant, if he did not know of the falsity of the statements made, at least assumed, or intended to convey the impression that he had actual knowledge of the truth of the representations as to the condition of the engines, though conscious that he had not; while it is conceded by him that he knew the price to be paid for them was less than the sum he named and received for them from Mr. Cutting, and, therefore, that his representations in that respect were false. The case thus stands upon the broad ground that the defendant was guilty of fraud. Having arrived at this conclusion, it is not considered necessary to examine the various phases in which this appeal was ingeniously presented on the part of the defendant. The representations as to the condition and price having been declared to be false within the rules of law, and the defendant having been the moving and procuring cause of the sale in the character of the plaintiff's agent, it becomes wholly immaterial in what manner he may have formally changed, if at all, that relation to them. He

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received their money in compensation for his services in procuring for them the engines, and gave his guarantee, it would seem, only as a part of the scheme of fraud, which increased his chances of success and rendered discovery the more doubtful. The broker or agent who buys for and with the money of his principal, can acquire no advantage by passing the title through himself (*Bench agt. Sheldon*, 14 *Barb. Rep.*, 66; *Moore agt. Moore*, 5 *N. Y.*, 256; *Edmonston agt. Hartshorne*, 19 *N. Y. Rep.*, 9; *Weed agt. Warner*, 5 *Paige*, 656). When the existence of fraudulent design is declared, it matters little by what variety of procedure the guilty party endeavors to hem himself in. All his barriers must give way before the crushing vitality of legal principles. Fraud vitiates everything (*Story on Contracts*, sec. 495). There is no shield which can protect, and no strategy which can save him, if the fraud be not waived or condoned, and the statute of limitations be not applicable. These views dispose of the main questions in the case, relating to the responsibilities of the defendant growing out of his conduct. In regard to the exceptions it is necessary to say that the evidence in reference to the true condition and value of the engines is in conflict, but the finding of the referee is abundantly sustained. We cannot say, therefore, that his conclusions on that subject are objectionable. It must be further said that the exceptions taken during the trial have no merit, and do not warrant us, therefore, in disturbing the judgment. The motion to dismiss the complaint — which was denied, and to which exception was taken — was properly disposed of, and the general discussion of the case and the results arrived at herein are a sufficient answer to the points made on that motion.

The exceptions to evidence worthy of mention are based—

1st. Upon the proposition that Mr. Cutting could not state the terms of his offer, which was in writing, signed by him, or a conversation in reference to a transaction concluded by agreement in writing; or, in other words could not state the details of the negotiations which led to the signing or execu-

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tion of those papers or either of them, when it is apparent that they were used only as forming part of the *res gestæ* and could be so employed, the papers being the result in part of the fraud practiced. The evidence objected to was not given to vary the terms of the contract, about which there was no dispute. It was for the purpose of demonstrating the object and design of the defendant and the fraudulent devices which were resorted to to accomplish them, and was clearly competent. Fraud opens the door to investigation, and no written instrument thus assailed is entirely protected from the effect of parol evidence (1 *Greenleaf's Evidence*, secs. 283, 284; *Sandford agt. Handy*, 23 *Wend.*, 260). "The covin," saith lord Coke, "doth suffocate the rights."

2d. Upon the ground that Bissel was not authorized by the defendant to represent him, when it appears that Bissel was sent by him to Mr. Cutting, having been selected as likely to affect the latter favorably; and when the relation being thus established between them, it appeared that Bissel participated in the representations as to the condition of the engines, and not only failed to inform Mr. Cutting of their selling price, of which he was advised in Boston, but also to appear as a witness in explanation of the circumstances, or in vindication of his own conduct—a silence in which the defendant also united.

It must be further said that the objection to the introduction of the copy of the specifications complained of is not tenable. The whole evidence considered, it is the best conclusion that the original was not produced, and that the copy received was, in fact, a transcript of the original, as presented to Mr. Cutting.

The judgment should be affirmed.

Knoeppel agt. Kings County Fire Insurance Co.

N. Y. SUPERIOR COURT.

WILLIAM H. KNOEPPEL agt. KINGS COUNTY FIRE INSURANCE
COMPANY.

Injunction to prevent removal of signs.

In reference to the plaintiff's right to place his sign in a particular locality at the entrance of the rear offices leased to and occupied by him, where his lease contains no privilege or direction on the subject, he cannot arbitrarily claim the right to place his sign in a particular locality selected by him, and the continuance of an injunction thus protecting him. He should exhaust the means of an amicable arrangement within his reach with the other tenants and the landlord before coming to a court of equity in such a case.

Special Term, June, 1874.

MOTION by plaintiff to continue an injunction.

Sullivan, Kobbe & Fowler, for plaintiff.

Rodman & Adams, for defendant.

VAN VORST, J. — A continuation of this injunction would be an adjudication substantially that the plaintiff is entitled to place his signs on the east side of the doorway, and in the manner claimed by him, and likewise on the water-table.

The lease to the defendants bears date on the tenth day of February and contains a clause "that the one-third at least of the front water-table on Liberty street is reserved for signs for the tenants of the rear offices, and such amicable arrangement for signs on the side entrance as may be agreed for."

The plaintiff in his complaint claims that, before the lease was executed to him of the rear offices, the agent of the landlord had agreed that he might place his sign on the east side of the doorway, and approved of the style of sign which he subsequently adopted.

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But the lease to the plaintiff, which was executed two days after the lease was made to the defendants, contains no such privilege, and is entirely silent on the subject of signs or their location.

The lease itself must control, and the plaintiff can have no exclusive right to place a sign on the east side of the entrance, especially since the subject of the location of signs was left open by the terms of the previous lease, made by the landlord to the defendants, in which the disposition of signs was to be amicably arranged. Any understanding between the plaintiff and the agent of the landlord must be considered as merged in the lease subsequently made to him by the landlord himself, and which contains no special privilege or right to the plaintiff. If his lease was wrong the same should have been reformed.

The plaintiff cannot arbitrarily claim the right to place his sign on the east side.

The defendants, as appears by the affidavits, offered to enter into an arrangement on the subject, but plaintiff refused all negotiation, claiming, as absolute right, the east side of the entrance. Under such circumstances I do not consider it proper to continue this injunction. The parties must mutually and amicably agree as to where their signs shall respectively be placed at the entrance. If not it must be determined, on the hearing, as to the right of the parties.

Before coming to a court of equity, in a case of this kind, the plaintiff should have exhausted the means of an amicable arrangement within his reach and evidently contemplated.

It should be remarked that the agent of the landlord denies that he made any arrangement with the plaintiff, other than that contained in his lease, or that he has modified or changed the same. At the same time the defendant, whose lease was just executed, has no exclusive right; but before locating his signs was obliged to make an amicable arrangement with the later tenants of other parts of the premises.

Motion to continue injunction denied.

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CHENANGO COUNTY COURT.

GEORGE DAVIS, appellant, agt. PETER REYNOLDS, respondent.

Trustee of an express trust — what constitutes it.

An agent of a mowing machine company, who contracts and sells mowing machines for the company, is a "trustee of an express trust," and may sue on the contract in his own name.

THIS was an action tried before Hiram Briggs, Esq., a justice of the peace of the town of Sherburne, Chenango county.

The plaintiff in his complaint alleged that, on the 1st day of July, 1869, at the request of the defendant, he sold and delivered to the defendant one mowing machine at the agreed price of sixty-five dollars; that, in consideration of such sale and delivery, the defendant promised to pay the plaintiff the said sum of sixty-five dollars by the 1st day of September, 1869; that plaintiff had frequently demanded payment of defendant, and defendant had neglected and refused to pay the same and demanded judgment for sixty-five dollars and interest thereon from July 1st, 1869.

Defendant denied each allegation in the complaint, except as afterward admitted.

Defendant admitted that he purchased a mowing machine of the plaintiff during the season of 1869, and promised to pay therefor the sum of sixty dollars as soon as he, said defendant, could make a turn of his produce in the fall, without interest. Defendant further alleged that the plaintiff warranted the machine, at the time of the purchase, to be a good, first-class machine and had no faults or defects and would work well, and that, if it was not as represented,

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he would take it back; that, relying upon said warranty, he purchased said machine. The defendant then alleged that said machine was an imperfect, badly-constructed machine, and did not answer the purpose for which it was constructed, and that the same was worthless and claimed damages in the sum of fifty-five dollars. On the trial the plaintiff was sworn as a witness in his own behalf, and testified that he sold defendant a Wood Mowing Machine, manufactured at Ilion, for the sum of sixty dollars; that he sold it in his own name, and the defendant promised to pay him for the machine. On his cross-examination, the plaintiff testified that he was the agent of the Remington Agricultural Company and had been for the last fifteen years, and sold mowing machines for the company on commission; that there was no agreement between himself and the company by which he guaranteed the sales of the machines; that he sold the machines, collected the money and paid the same to the company, after deducting his commissions. He further testified that he sold the machine in question to the defendant as the agent of the company; that he acted as the agent of the company in the sale of the machine, but did not disclose his agency to the defendant, but made the contract in his own name.

At the close of plaintiff's evidence the defendant moved for a nonsuit on the following grounds: 1st. That the plaintiff is shown not to be the party in interest; 2d. That the Remington Agricultural Company is shown to be the party in interest; 3d. That an agent cannot sue in his own name to recover the debt of his principal. The justice granted the motion to nonsuit the plaintiff, and rendered judgment against the plaintiff for \$8.10 costs, February 1, 1870. From this judgment the plaintiff appealed to this court.

D. L. Atkins, attorney for appellant.

Newton & Tillson, attorneys for respondent.

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H. G. PRINDLE, *Ca. J.* — The principal question arises upon the nonsuit granted by the justice. The attorney for the appellant claims that the plaintiff was a trustee of an express trust within section 113 of the Code, and that the suit was properly brought in his own name. The Code provides that "every action must be prosecuted in the name of the real party in interest," except that "an executor or administrator, a trustee of an express trust or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted" (*Code*, §§ 111, 113); and it is declared that "a trustee of an express trust, within the meaning of the section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another" (§ 113).

Did the plaintiff make this contract in his own name for the benefit of the Remington Agricultural Company, within the meaning of this section of the Code? If he did, the justice erred in granting the nonsuit. It is plain that the plaintiff was not the real party in interest; still he may sue, in his own name, if he is a trustee of an express trust within the meaning of that term in section 113 of the Code. Is he a person with whom, or in whose name, a contract is made for the benefit of another? As such he would be authorized to sue the defendant in his own name, notwithstanding the beneficial interest was in the Remington Agricultural Company. The contract was made with the plaintiff in his own name and the defendant promised to pay him for the machine, and the plaintiff was authorized to receive payment and grant a discharge to the defendant of the claim.

In *Griswold agt. Schmidt* (2 *Sandf.*, 706) it was held that "a factor or mercantile agent who contracts in his own name, on behalf of his principal, is a trustee of an express trust within the meaning of section 113 of the Code, and is a proper party to bring an action upon the contract." The court, on page 709, says: "It has been generally supposed that the words '*express trusts*,' in this section, refer to trusts

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of land authorized by the Revised Statutes, and which are in the statutes themselves termed 'express trusts,' and to them alone. It is not necessary, however, to give to the words this restricted meaning. They are capable of a more extensive signification, so as to include all contracts in which one person acts in trust for or in behalf of another. Of this kind are contracts made by factors, and other mercantile agents, who act in their own names, but for the benefit of, and without disclosing, their principals." This decision was made in 1850, and previous to the amendment of the Code. Since then section 118 of the Code has been amended by declaring that "a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another," thus giving, in express terms, the same construction to the term "a trustee of an express trust," as had been given by the superior court in the above case. "A factor is an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal, for a compensation commonly called factorage or commission" (*Bouvier's Law Dictionary*). A factor has a right to sell the goods in his own name, and when untrammelled by instructions he may sell them at such times and for such prices as in the exercise of a just discretion he may think best for his employer. He is for many purposes, between himself and third persons, to be considered as the owner of the goods. He may, therefore, recover the price of goods sold by him in his own name, and consequently he may receive payment and give receipts and discharge the debtor, unless notice has been given by the principal to the debtor not to pay. He has a lien on the goods for his advances and commissions. I am inclined to the opinion that the plaintiff in this action must be considered as a factor, and if he was such, the case of *Griswold agt. Schmidt* (*supra*) would be authority for bringing the suit in his own name. The above case was cited in *Brown*

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agt. *Cherry* (56 *Barb.*, 685) and approved, and it has been also cited with approval in other cases.

It has been held that a mere agent who contracts in his own name, and without disclosing the name of his principal, is a trustee of an express trust, and may maintain an action upon the contract in his own name without joining his principal, or the principal may sue upon the contract (*Morgan agt. Reid*, 7 *Abb. Pr. Rep.*, 215; *The Union India Rubber Co. agt. Tomlinson*, 1 *E. D. Smith*, 380).

In *Bogart agt. O'Reyan* (1 *E. D. Smith*, 590) it was decided that "an auctioneer, who, in his own name, sells goods for a third person, is a trustee of an express trust, within the meaning of section 113 of the Code, and may sue upon the contract of sale without an assignment to him of the cause of action."

In *Minturn agt. Main* (3 *Selden*, 220) it was decided that a public auctioneer who sells goods for another may maintain an action for the price, although he has received his advances and commissions, and has no interest in the property or its proceeds.

In *Brown agt. Cherry* (56 *Barb.*, 635, and 38 *How.*, 352) the doctrine established by the cases above cited is distinctly approved and reiterated.

In order to constitute a trust in respect to money or personal estate, no formal or written agreement is necessary (*Day agt. Roth*, 18 *N. Y.*, 444).

The question involved in this case would not have been changed if the contract of sale had been reduced to writing and signed by the parties; the plaintiff's character as trustee of an expressed trust, under section 113 of the Code, would not be different, nor his right to sue have been in any way affected by such written contract.

In *Considerant agt. Brisbane* (22 *N. Y. Rep.*, 389) the plaintiff was the executive agent of a foreign corporation, and authorized to receive subscriptions to its capital stock; the defendant subscribed for and received stock of the com-

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pany from the plaintiff, to the amount of \$10,000, and he executed two promissory notes and delivered them to the plaintiff, by each of which he promised to pay to *him*, "as executive agent of the company," the sum of \$5,000. The plaintiff sued upon the notes in the superior court of New York, and in the complaint the notes were set forth at length. The defendant demurred to the complaint, assigning as the ground that it did not state facts sufficient to constitute a cause of action. The superior court, at general term, sustained the demurrer, on the ground that the action could not be maintained by the plaintiff; WOODRUFF, J., writing the opinion. The plaintiff appealed, and the court of appeals reversed the judgment, and held that the plaintiff was a trustee of an express trust within section 113 of the Code, and had a right as such to bring a suit in his own name on the notes. WRIGHT, J., in delivering the prevailing opinion of the court (*on p. 394, &c.*), says: "Prior to the Code, I am of the opinion that the plaintiff might have maintained an action on the express contracts, set out in the complaint, for the benefit of his principals, having a legal interest therein by way of trust. The promise being to him, in writing, for the benefit of another, he would have been deemed the party with whom, or in whose name, the contracts were made, and in whose name alone the promise could be enforced in a court of law. The Code, however, abrogated the common-law rule that the right of action followed the legal title, and made the beneficial interest the sole test of the right. In adopting the latter rule, it was easily to be seen that there was a class of cases in which it would be extremely prejudicial to the remedy, as well as difficult of application, viz., the case of executors, persons authorized by statute to sue, and trustees of an express trust. To obviate this it was specially provided that, in these cases, the executory or statutory party, or trustee of an express trust, might sue without joining with him the person for whose benefit the action was prosecuted (*Code*, § 113). The term 'trustee of an express trust'

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had, however, acquired a technical and statutory meaning. Express trusts, at least up to the adoption of the Revised Statutes, were defined to be trusts created by the direct and positive acts of the parties, by some writing, or deed or will; and the Revised Statutes had abolished all express trusts, except as therein enumerated which related to land. If section 113 of the Code was to be confined and limited to those enumerated as express trusts, the practical inconvenience arising from making the beneficial interest the sole test of the right to sue, and which that section was intended to obviate, would continue to exist in a large class of formal and informal trusts. Accordingly, in 1851, the section was amended by adding the provision that a trustee of an express trust, within the meaning of the section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. It is to be observed that there is no attempt to define the meaning of the term 'trustee of an express trust' in its general sense; but the statutory declaration is that these words 'shall be construed to *include* a person with whom, or in whose name, a *contract* is made for the benefit of another.' The counsel for the respondent insists, that the sole intention of the legislature, in amending the section, was to remove a doubt that has been expressed, whether a factor or other agent, who had at common law a right of action on a contract made for the benefit of his principal (by reason of his legal interest in the contract), was, by the Code, deprived of that right. But no such limited intention can be inferred from the words of the statute. Indeed, it is only by a liberal construction of the section that the case of a contract by a factor (an individual contract) can be brought within it at all. It is intended, manifestly, to embrace not only formal trusts, declared by deed *inter partes*, but all cases in which a person acting in behalf of a third party enters into a written express contract with another, either in his individual name, without description, or in his own name, expressly in trust for or in behalf

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of another, by whatever form of expression such trust may be declared. It includes not only a person with whom, but, one in whose name a contract is made for the benefit of another."

I think, upon these authorities, there can be but little question that the plaintiff was a trustee of an express trust within the meaning of section 113, as it now stands.

The counsel for the respondent contend that the plaintiff should have sued as trustee of an express trust, and alleged that fact in his complaint. No question was raised upon the trial in regard to the pleadings. The plaintiff was nonsuited on the ground that he was not the real party in interest, and I think it is now too late, upon this appeal, to raise a question in regard to the complaint which was not raised upon the trial. If the objection had been made before the justice the complaint, if defective, could have been amended, and a motion for a nonsuit denied, if that had been the only difficulty. The defendant treated the transaction throughout as a sale from the plaintiff directly to him, and admitted in his answer that he purchased the machine in question of the plaintiff, and sought to charge the plaintiff personally with a breach of warranty on the sale of the machine, and claimed a large amount of damages in his answer, resulting from a breach of such warranty; and there can be no question about the liability of the plaintiff, personally, to the defendant, if a breach of warranty had been proven on the trial.

My impressions on the argument of this appeal were strongly in favor of sustaining the decision of the justice in nonsuiting the plaintiff, but I have since thoroughly and carefully examined all the authorities bearing upon this question, and I am satisfied the justice was wrong in nonsuiting the plaintiff. I am clearly of the opinion that the plaintiff, within both letter and spirit of section 113 of the Code, was a trustee of an express trust, and was authorized to bring this suit, in his own name, to recover for the machine in question. I think it was the intention of the legislature, by this

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amendment to the Code, to authorize just this class of persons to sue, in their own names, for property sold by them as the agents of the various manufacturing companies in our own and other states of the union. There are numerous foreign companies and corporations engaged in various manufacturing enterprises, who consign their manufactured articles to agents residing in this state, for sale, who usually (although acting as agents) make contracts of sale in their own names, with the various parties with whom they deal; and to hold, in every such case, that the suit must be prosecuted in the name of the real party in interest, instead of the agent thus contracting, would entirely ignore this wise provision of the Code, and, instead of facilitating the collection of this class of indebtedness, would, unnecessarily, place obstructions in the way of their enforcement, without benefit resulting to either party.

The justice erred in nonsuiting the plaintiff, and the judgment must be reversed, with costs.

Casserly agt. Manners.

SUPREME COURT

BERNARD CASSERLY, Receiver, &c., agt. DAVID S. MANNERS
et al.

Reinsurance—its benefits for the company and not for particular policyholders.

The law authorizing reinsurance was intended that when reinsurance is made it should be made in the name of and for the benefit of the company, and not of individual policyholders.

Any construction placed upon the law authorizing reinsurance which would allow reinsurance in favor of the policyholder, brings it into conflict with the statute forbidding a corporation from giving preferences; whereas, if the reinsurance is made for the benefit of the company, the two statutes do not conflict.

The allowing reinsurance is not for the benefit of individual policyholders, but for the benefit of the whole body.

Special Term, July, 1874.

THE New Amsterdam Fire Insurance Company was a corporation duly organized under the laws of the state of New York in the year 1852. In the month of October, 1871, the defendants were the directors of said company, and its assets, including capital and surplus, amounted on the first day of that month to the sum, exceeding a little over \$400,000.

The said company had agencies for the transaction of the insurance business in Philadelphia, Chicago and Milwaukee.

On the 8th, 9th and 10th of October, 1871, a large and disastrous fire occurred in Chicago. All New York companies who had agencies in that city suffered immense losses, the consequence of which was a panic among insurance men,

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and a feeling that every company which had agencies in that city had become insolvent. On or about the 12th day of October, 1871, the directors of the New Amsterdam Company passed the following resolution :

"Resolved, That, provided the losses of the company by the fire at Chicago shall not exceed the amount of the capital and surplus of the company over and above reinsurance, excluding the lease of the company of No. 173 Broadway, that the stock of the company be filled up by the stockholders, *pro rata*, to any amount that may be required therefor."

It was impossible to ascertain the amount lost by the New Amsterdam Insurance Company at once, in consequence of the great confusion arising from so great a calamity in Chicago, and the exact amount of the losses were not ascertained until the latter part of the month of November, when they were found to reach about the sum of \$400,000.

On the 26th day of October, 1871, the directors of the New Amsterdam adopted the preamble and resolution following, to wit :

"Whereas, In view of the great anxiety manifested by the policyholders of the New Amsterdam Fire Insurance Company in reference to its losses at Chicago ; and, whereas, our agents at that place have failed to furnish the company with a detailed statement of its losses ; and, whereas, under the circumstances, it is deemed advisable to reinsure all the policies taken at and issued from this office (not including agency policies), until such time as a satisfactory adjustment of such losses can be made ; and that such reinsurance shall be effected in some company where the same may be returned to this company when deemed advisable ; and as such arrangement can be made with the Home Insurance Company of New Jersey, with a fresh paid in capital ; therefore

"Resolved, That the officers be authorized and directed to reinsure said risks in said company in the name and for the benefit of the policyholders, and pay to said Home Insurance Company of New Jersey, \$40,000, being the estimated

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amount for said reinsurance; which reinsurance shall be accurately calculated by a person to be appointed by the board of directors of each company, and if said sum shall be deficient or in excess of the amount, the same to be paid by or returned to this company."

That the said Home Insurance Company was a New Jersey corporation, which had been organized some little time before the passage of this resolution, and had a paid up capital of \$60,000, but had, up to this time, done little or no business. That the president and secretary of the Home Insurance Company were also the president and secretary of the New Amsterdam Insurance Company. The defendants, Wallis, Duryea, Brunges, Bearn, were also directors in the Home Insurance Company. On the twenty-seventh of October, the said sum of \$40,000 was paid by the New Amsterdam Company to the Home Company, and the latter company insured in bulk the home risks of the New Amsterdam; but no policy was issued, nor was the consent of the policyholders of the New Amsterdam Company asked. The amount of the risks thus transferred amounted to about \$10,000,000. Immediately after this time the officers of the New Amsterdam Company commenced negotiations with the policyholders at Chicago for a settlement of their losses as adjusted at fifty cents on a dollar, and procured a composition deed to be signed by most of the policyholders to that effect.

The said losses, if paid in full, would have exhausted the entire capital and surplus of said company, and the remaining policyholders would have been entirely without security.

The Home Insurance Company continued to do business only for a few months, and was then wound up. It paid promptly all losses which accrued upon the risks transferred from the New Amsterdam. On the 19th day of December, 1871, the plaintiff was appointed receiver of the New Amsterdam Company, it being declared to be insolvent, and this action is brought against the directors of said company to recover of them the \$40,000 paid to the Home Insurance

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Company, it being claimed to have been paid in violation of law.

W. H. Peckham and E. R. Meade for plaintiffs.

John K. Porter, N. B. Howie and John Winslow for defendants.

VAN BRUNT, *J.* — The foundation of the plaintiff's claim to a recovery in this action is, that the directors, by their action, have violated their duties, as officers of the New Amsterdam Fire Insurance Company, in appropriating the \$40,000 to the purposes which they did.

First, because the Home Insurance Company is a foreign corporation, excluded by the laws of this state from doing business therein; and, secondly, because the New Amsterdam had no power whatever to effect reinsurance in any company, in the manner which was done in this case.

I shall consider this last proposition first; and, in disposing of this question, I shall assume that the directors did not have a positive intent to commit a fraud, although their acts may have amounted, if unauthorized by law, legally to a fraud upon the creditors of the company. They certainly did not suppose that they were violating any law — if they have done so. They supposed that, by arrangements which could be made with the creditors of the company at Chicago, that it would be able to continue business; but these expectations seem to have been based upon their being able to effect some compromise with their creditors.

The evidence of the case would seem to warrant the finding, however, that unless such compromise was effected there were very great doubts as to the ability of the company to go on with their business. I have been entirely unable to discover where the law gives any authority whatever for the effecting of a reinsurance in the manner in which this has been done.

It is true that the act under which fire insurance companies

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are organized provides that any company organized under that act may effect reinsurance of any risks taken by them respectively; but is this power of reinsurance to be exercised for the benefit of the company or policyholder? Was it intended by that statute to allow the company, at its option, to give to a few favored policyholders the securities of two companies instead of one? Was the money contributed in premiums by policyholders to be used in procuring a reinsurance of policies in which they had no interest, and from which reinsurance they might not derive any benefit? Was it not intended that this reinsurance, when made, should be made in the name of and for the benefit of the company, and not of individual policyholders? If this is not the true construction of this law, then any insurance company in insolvent circumstances may, by reinsurance, use the whole of their assets to procure reinsurance, and thus deprive their creditors of any means of collecting their debts, and thereby giving a preference of the holders of policies whose losses shall accrue subsequent to such reinsurance, which our statute expressly forbids.

The insurance in this case was not for the benefit of the company. Even if every policy had been surrendered, no amount such as was paid for reinsurance would have been withdrawn from the creditors of the company. In fact the reinsurance was not made because of any anticipated benefit to the creditors of the company, but expressly to keep the business for the benefit of the New Amsterdam Company after they had settled their Chicago losses.

It will be noticed that the Home Company was to return these risks when required by the New Amsterdam Company.

The resolution provides that the reinsurance shall be in the name of and for the benefit of the policyholders whose risks were reinsured, not all their policyholders, but only for the benefit of those whose policies issued from the home office; this in itself was, I think, a violation of the statute forbidding corporations from giving preferences.

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It may be said that this company was not insolvent, and the directors did not know such to be the fact. The answer to that is that they knew that they had risks enough in Chicago to render them insolvent if there was a total loss.

They knew that an immense fire had occurred there, and that they might be insolvent and probably were, and as the facts since developed show they were; and although they passed a resolution looking to the supply of any amount as to which their capital might be impaired, their stockholders were not required to comply with any such resolution. The whole theory upon which they expected to continue business was that they could compromise it with their Chicago creditors by paying a percentage of the amounts due under their policies.

These facts seem to me to show that they contemplated not only the possibility but the probability of their not being able to pay their Chicago losses in full.

Under these circumstances the company take \$40,000 of the assets of the company which belonged to the creditors, and prefer by reinsurance a certain class of policyholders to the exclusion of all others. This was giving a preference to a certain class who might thereafter become creditors of the company, which the directors had no right to do. It is not necessary to pass upon the question whether, under the circumstances of this case, if the reinsurance had been effected for the benefit of the New Amsterdam Company, the directors would have been protected, for the insurance was not done in that way. The result of this operation is that the policyholders at the home office use the money contributed partially by the Chicago policyholders for the purpose of putting their policies beyond the contingency of any loss which might arise from the inability of the New Amsterdam Company to pay all its losses — money which the Chicago policyholders had the right to demand should be kept to answer their losses. It may be asked, what difference does it make to the Chicago policyholders whether the reinsurance was

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effected in the name of the New Amsterdam Company or in the name of the policyholders?

If the insurance is made in the name of the company, in case of the payment to the company of any loss which has been reinsured, all the creditors receive the benefit from the payment of such loss, and they all receive the same dividend upon their claims; whereas if the reinsurance is made in the name of the policyholder, and a loss occurs, the policyholder who is reinsured has his loss paid to him in full by the company in which he has been reinsured, while another policyholder who suffers a loss at the same time, and has not been reinsured, gets only a percentage upon his loss. Any construction placed upon the law authorizing reinsurance which would allow reinsurance in favor of the policyholder, brings it into conflict with the statute forbidding a corporation from giving preferences; whereas, if the reinsurance is made for the benefit of the company, the two statutes do not conflict.

The law allowing reinsurance is not for the benefit of individual policyholders, but for the benefit of the whole body.

It seems to me, therefore, that the directors, in making such reinsurance, violated their duty, and are liable to the creditors of the company for the misappropriation of this money.

The receiver in this action represents all the creditors. The directors are undoubtedly entitled to be subrogated to the rights of any policyholders whose losses have been paid by the Home Insurance Company.

In view of the novelty of the question, I shall grant a stay of proceedings upon the judgment until the appeal may be heard at the general term, in case the defendants should desire to appeal.

I have not considered it necessary to determine the first proposition.

The plaintiff must have judgment.

Waring agt. Senior.

SUPREME COURT.

LYNDE B. WARING agt. AUGUSTUS SENIOR.

Appeal — service of notice of, too late.

The service of notice of appeal from the special to the general term of this court, made after the expiration of the time limited for appealing, cannot be sustained, although the respondent's attorney admits due service of notice of the appeal.

If the admission of the respondent's attorney could be considered as a waiver of the irregularity as to him, it could not affect the notice served on the clerk.

*Second Judicial Department, Brooklyn General Term,
December, 1874.*

BARNARD, DONOHUE and TAPPEN, *Justices.*

THIS was an appeal from an order made by JOSEPH F. BARNARD at special term, dismissing an appeal attempted to be taken by the defendant to the general term in this action from a judgment entered in favor of the plaintiff and against the defendant for \$269.37, in Orange county clerk's office, on March 16th, 1874. The papers used on the motion, as well as the appeal, are as follows :

SUPREME COURT — ORANGE COUNTY.

LYNDE B. WARING

agt.

AUGUSTUS SENIOR.

COUNTY OF ORANGE, ss. : W. J. McDonald and Lynde B. Waring being severally duly sworn does each, for himself, depose and say as follows :

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That the said McDonald is the attorney for the plaintiff in this action, and that the said Waring is the plaintiff therein; that said action, after issue was joined therein, was duly referred by consent to William D. Dickey, of Newburgh, N. Y., as sole referee to hear, try and decide the same; that said action was duly tried before said referee, and after the same was duly submitted to him, he duly decided the same in favor of the plaintiff for the sum of one hundred and eighteen $\frac{90}{100}$ dollars, with interest from April 28th, 1873, and duly made and delivered his report to that effect; that, on the 16th day of March, 1874, a judgment was duly docketed in the clerk's office of Orange county upon said report, and decision in favor of the plaintiff against the defendant for the sum of two hundred and sixty-nine $\frac{87}{100}$ dollars damages and costs; that, on the 18th day of March, 1874, a written notice was duly served by the deponent McDonald upon Charles R. Lee, Esq., who was and is the attorney in said action for the defendant, which said notice was to the effect that said judgment had been duly entered and docketed in the clerk's office of Orange county, on said 16th day of March, 1874; that said Charles R. Lee, thereupon, on the said 18th day of March, 1874, duly admitted in writing the due service of said notice of entry of judgment on him; that, on the 20th day of April, 1874, and not prior to that date, the said Charles R. Lee served a notice of appeal from said judgment to the general term of this court on said W. J. McDonald, plaintiff's attorney; and on the same day, and not before, served a notice of appeal from said judgment on the clerk of Orange county.

That these deponents in no wise consented that such appeal might be taken, and further deponents say not.

LYNDE B. WARING.

W. J. McDONALD.

Sworn to before me, this 7th day of }

August, A. D. 1874. }

J. R. BUXTON, *Justice of the Peace*

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And the notice of appeal, the proposed case and an admission indorsed on the notice of appeal in the following words: "I hereby admit due service of the within, this 20th day of April, 1873. Wm. John McDonald, plaintiff's attorney."

Charles R. Lee, attorney, and *Walter C. Anthony*, counsel, for defendant and appellant.

1st. The appeal being to the general term, the special term had no power to dismiss it (*Barnum* agt. *Sensoca County Bank*, 6 *How.*, 82; 1 *Code Rep.* [*N. S.*], 405).

2d. The appeal was dismissed because the notice of appeal was not served in time. It was served on the thirty-second day on the respondent's attorney and on the county clerk.

The respondent's attorney admitted due service thereof. This was a waiver of the right to object that it was not served in time (*Streever* agt. *Ocean Ins. Co.*, 9 *Abb.*, 23; 2 *Hilton*, 475).

3d. There was a delay of five months before moving to dismiss the appeal. The *motion* should have been denied for that reason (*Stevenson* agt. *McNitt*, 27 *How.*, 335).

4th. The admission of service was a *submission* to the jurisdiction of the tribunal whose right to the appeal, his motion to dismiss *questioned*; and that motion should, therefore, have been denied (*Pearson* agt. *Lovejoy*, 53 *Barbour*, 411, and cases there cited; 27 *Barbour*, 343).

Wm. John McDonald, attorney, and *S. E. Dimmick*, counsel, for plaintiff and respondent.

1st. The appeal *must* be taken within thirty days after written notice of the judgment shall have been given to the party appealing (*Code of Procedure*, section 332).

2d. The appeal *must* be made by the service of a notice in writing on the adverse party *and on the clerk*, with whom the judgment is appealed from is entered (*Code*, section 327).

3d. The notice of appeal must be *served on the clerk* as

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well as respondent within the thirty days (*Code, section 327; Westcott agt. Pratt, 1 Code Rep., 332*).

4th. If it is not, the appeal is a nullity (*Morris agt. Morange, 26 How., 86, and 17 Abb., 86*).

5th. The plaintiff's attorneys' admission of due service of the notice on him after time is not a waiver of the service on the clerk. His consent to receive the notice of appeal is not a waiver of his right to demand the notice of appeal should be served on the clerk within the thirty days. Nor is it an agreement to the submission of the action to an appellate tribunal.

6th. The special term is the proper and only place at which a motion to dismiss an appeal on the above grounds can be made.

Order appealed from affirmed, with ten dollars costs.

Before all the judges. No opinion given.

McHugh agt. Imperial Fire Insurance Company.

NEW YORK SUPERIOR COURT.

JOHN MCHUGH agt. THE IMPERIAL FIRE INSURANCE COMPANY.

Reformation of policy of insurance.

In order to justify the reformation of a policy of insurance the evidence must show a mistake to have been made by both parties, and that the instrument is not such as it was intended to be when issued and received.

A mistake on one side may be ground for rescinding a contract for a refusal specifically to enforce its terms, but not for its alteration, and the imposition upon the other party of obligations and liabilities which he never intended to assume.

Special Term, December, 1874.

ACTION to reform a policy of insurance.

W. B. Putney, for plaintiff.

N. B. Howie, for defendant.

VAN VORST, J. — In order to justify the reformation of this policy of insurance, the evidence should satisfactorily establish that a mistake has been made by both parties, and that the instrument in question is not, in the particulars now complained of by the plaintiff, such as it was intended to be when issued and received.

It is not enough to sustain an action of this nature, that, upon examination of one of the parties thereto, long after the receipt of an instrument by him, he discovers that it is not such in its terms and conditions as he believed it to be at the time he received it. In order that it be reformed it

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must further appear that in the same respects it was not such an instrument as the party obligated intended to execute.

The mistake must be mutual. A mistake on one side may be a ground for rescinding a contract, or for a refusal specifically to enforce its terms, but not for its alteration, and the imposition upon the other party of obligations and liabilities which he never intended to assume (*Adams' Equity*, 171; *Nevins agt. Dunlap*, 33 *N. Y.*, 676; *Story agt. Conger*, 36 *N. Y.*, 673; *Rider agt. Powell*, *N. Y. Court of Appeals Decisions*, 4 *Abbott*, 63; *Ervin agt. N. Y. Central Ins. Co.*, 3 *N. Y. Sup. Ct. Reps.*, 213). Conceding that the evidence shows that the plaintiff through his agent, Dunham, applied in general terms for a renewal of the policy before its expiration, and that the then existing policy contained the words "other insurance allowed without notice." I am not satisfied from the evidence that the defendant agreed to a renewal on those terms.

In fact the evidence shows that the risk was not renewed by renewal receipt as was usually the case, but that on the other hand a new policy was made out, dated on the 28th October, 1871, and was within a few days thereafter delivered to the agents of the plaintiff, and received and retained by them without objection.

In this policy no provision was made for the allowance of other insurance without notice.

Such provision, when made, is usually entered in a blank space in the body of the policy, after the description of the subject of insurance and its location, and would require to be written in.

There is no such writing in the policy in question, and the omission of such words is discoverable directly the policy is opened and examined.

The policy was received for the plaintiff by insurance brokers, his agents, who were specially familiar with such instruments, and was by them transmitted to the plaintiff.

The insured has testified that he did not discover the omis-

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sion of these words until after his property was destroyed by fire, and nearly a year after the policy was received by him.

The omission of the insured at the time to examine the policy affords no valid reason for now writing in the policy new words to obviate the consequences of his acts, which appear to have avoided the policy; most certainly not, if the defendant did not intend originally that they should be there.

The clerk of the defendant who directed the filling up of the policy says, distinctly, that he was instructed by his superior in the office to omit from the policy in question the clause granting such permission.

From this it would seem that the policy is such as the defendant intended at the time to write.

And the intention to omit these words is more clear, if the policy in question, as is claimed, was written from the memorandum made in the policy register, in 1869, which contained the omitted words.

Twice, at least, after the issue of the policy, and before the fire, the policy was presented by the plaintiff, or on his behalf, to the underwriters for alteration. On one occasion, a material change was made in the character of the risk by the erasure of certain words; and, on another, an indorsement was made, declaring the policy originally taken out in the name of the plaintiff and another, to be held for plaintiff's exclusive benefit, and new privileges were conceded.

Under such circumstances it is difficult to conceive how the insured could be ignorant of the terms of the policy. He should be held to have adopted the instrument. No reasonable excuse for ignorance can be well assigned.

There is no just foundation for any charges that the action of the defendant, in omitting the words in question, was fraudulent.

There was no attempt at concealment or deception. The language of the policy is plain, and the space in which the permission if conceded should have been written, is left

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conspicuously blank and open to discovery on the most casual inspection of the policy by the plaintiff, or the insurance brokers, his agents, who were familiar with the entire subject.

And if this privilege was asked for by the agents of the plaintiff, at the time of the application for the renewal of the insurance, the delivery of the policy to them was a distinct notice that such permission was not then conceded (*Pindar agt. The Resolute Fire Ins. Co.*, 47 N. Y., 117).

The granting of the relief asked in this action would be substantially to impose upon the defendant conditions and terms to which they never assented, and to deprive them of the privilege of canceling the risk and avoiding all liability which they would have had if this permission had been insisted upon before the fire and they continued indisposed to yield the point.

The case in its results, if the views here expressed be correct, deprives the plaintiff of indemnity for his loss from the defendant. But the mistake if any, through which he fails is his own, and is the result of the oversight and neglect of himself and his agents.

But it would not answer to cast upon the defendant, by placing them under the obligations of a different contract from that to which they assented, consequences for which they are not responsible.

There should be judgment for the defendant.

Todd agt. Warner.

CHENANGO COUNTY COURT.

CHARLES TODD, respondent, agt. STEPHEN WARNER, appellant.

Improper evidence received to show the value of an article.

A witness cannot give evidence of the market value of honey, generally, which he has never seen, but such as had been described by a former witness which he heard, without confining it to the quality thus described.

The most that could have been legitimately obtained from the witness would have been an answer to the hypothetical question: What was second and third-class honey worth per pound? The former witness having classified the honey as first and second-class honey in his evidence.

THIS was an action for trespass, for breaking and entering plaintiff's close and cutting a bee tree, and carrying away the honey, &c.

It was conceded upon the trial, by the defendant, that he cut the tree and carried away the honey taken from the tree, in which there was a swarm of bees. The only important question arose upon the measure of damages. The cause was tried before Isaac Plumb, Esq., a justice of the peace of the town of Sherburne, Chenango county, and a jury. Upon the trial James Andrews, a witness for the plaintiff, testified that he heard the evidence of the defendant as to the grades of honey. The defendant conceded the competency of the witness as to the value of honey generally in that vicinity, and the following question was then put to him by plaintiff: "What is the market value of honey such as has been described, per pound?" Which was objected to by the defendant; 1st. As illegal and improper. 2d. There is no evidence showing any ownership of the honey by plaintiff,

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or that it was the property of any person except the first possessor, who is the defendant. 3d. The witness isn't competent to give an opinion, having never seen the honey in question. 4th. The question should call for the market value of the honey in question. 5th. The question should call for the value of the honey in question. 6th. If the witness could in any case give the value of property not seen, it could only be after particular description embraced in the question, or testified to by some other witness, heard by the witness giving the opinion. 7th. That there was not sufficient evidence as to the grades of honey in question to enable this witness to properly form an opinion. 8th. That the witness should state facts and not give an opinion. The objections were overruled and the witness answered: "Should think it was worth from ten to fifteen cents for the second grade and the third grade of the honey. The comb has some little value."

Adin Ramsdall had been previously examined as a witness for the plaintiff, and had given a description of the honey. The jury rendered a verdict for plaintiff for \$2.50 damages, upon which the justice rendered judgment with five dollars costs, on the 19th day of October 1871. From this judgment the defendant appealed to this court.

D. L. Atkins, attorney for appellant.

Holden & Fuller, attorneys for respondent.

H. G. PRINDLE, *County Judge*.—The only question of importance that I propose to consider in this case is whether the justice erred in overruling the objections to the question put to the witness Andrews: "What is the market value of honey such as has been described per pound?"

I have examined carefully the authorities bearing upon this question, and I am of the opinion that the justice erred in overruling the defendant's objection to this question. It is very doubtful whether the witness could have testified to the

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value of the honey in question without having seen the honey. In *Westlake agt. St. Lawrence Mer. Ins. Co.* (14 Barb., 206), it was held that "the opinion of a witness in respect to the value of property which he has never seen is not admissible in evidence." In *Buckhard agt. Babcock*, (27 How. Pr. Rep., 406), it was stated in the opinion that "opinions of the value of articles may be given by those familiar with the identical article or similar ones." There is, however, another objection to the question which I think is fatal, and that is allowing the witness to swear to the value of honey such as has been described by the witnesses. In *Page agt. Hazen* (5 Hill, 603), it was held that "the opinions of witnesses based upon a state of facts sworn to by others, are not proper evidence, except in matters lying peculiarly within the knowledge of experts." This doctrine was approved in *Clark agt. Baird* (5 Selden, 187), and in *Scott agt. Lilienthal* (9 Bosworth, 224). In the last case the court said: "A witness in order to be permitted to give his opinion of the value of any subject as an item of evidence, must be personally acquainted with it; which it cannot be presumed is possessed by people generally; or if, though possessing that knowledge, he is not personally acquainted with the subject, the particulars of it, which, it is assumed, a jury may, upon the evidence find to exist, must be stated by way of hypothesis, and the opinion confined to the hypothetical case stated." In the case under consideration it does not appear that the witness had heard any of the evidence in regard to the quality of the honey, except what the defendant had testified to, and it appears that a witness called by the plaintiff had given evidence in regard to the condition and quality of the honey, or a portion of it, which the witness Andrews had not heard, yet he was allowed to give his opinion of the market value of honey such as had been described, *generally*, without confining it to the quality as described by the defendant in his evidence which was heard by the witness. I am unable to see how this evidence can be sanctioned within the well

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settled rule. The most that the plaintiff could have legitimately obtained from the witness would have been an answer to the hypothetical question: "What was second and third-class honey worth per pound?" The defendant had classified the honey as first and second-class honey, in his evidence, and such a hypothetical question would have been barely competent.

There are other questions in the case which it is unnecessary to consider as I think this evidence was improperly received, and for this error the judgment must be reversed.

Sullivan agt. Mayor, &c., of N. Y. City.

N. Y. COMMON PLEAS.

MICHAEL SULLIVAN agt. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

Janitor of a district court not an officer.

A janitor of a district civil court in the city of New York is not an officer, but an employe.

Consequently where such janitor received his appointment from the common council and his compensation was fixed by them, the board of estimate and apportionment cannot change it by a resolution under the charter of 1873.

Special Term, October, 1874.

THE plaintiff was appointed janitor of the sixth district civil court of the city of New York, in 1870, and his compensation fixed by the common council.

In December, 1873, the board of estimate and apportionment passed the following resolution :

“Resolved, That under the authority conferred upon the board by section 97 of chapter 335 of the Laws of 1873, this board do now fix the salaries of the janitors of district courts at the sum of \$1,200, each, per annum, to take effect January 1st, 1874.”

Payment at that rate was offered by the defendants and received by the plaintiff, under protest, and action was brought to recover the balance. The defendants answered, setting up the resolution of the board, and plaintiff demurred to the answer as not stating facts sufficient to constitute a defense.

Elliott Sandford, attorney for plaintiffs.

Sullivan agt. Mayor, &c., of N. Y. City.

Section 97 of the charter relates to city officers, such as aldermen. The plaintiff is not an officer, he is an employe (53 *N. Y.*, 652). That decision is conclusive in this action (4 *N. Y.*, 71).

E. Delafield Smith, for defendants.

ROBINSON, J. — In the case of *Costello* agt. *The Mayor, &c., of The City of New York*, * I have recently held that a clerk employed by the common council is not an officer. A person who does not discharge independent duties, but acts by direction of others, and has no power to bind by his own acts, is not an officer (see cases cited in *Costello* case; *The King* agt. *Dr. Burnell*, *Carthew*, 478; 1 *Dillon's Municipal Corporations*, 146; 2 *Harrington*, 294; 3 *Yeates*, 300).

The demurrer is sustained, with leave to defendants to amend on payment of costs.

* Which has been recently affirmed by the general term.

Trolan agt. Fagan.

SUPREME COURT.

JOHN C. TROLAN agt. KITTIE L. FAGAN.

Admission of personal service of summons and complaint — irregularity.

Where the admission of personal service of the summons and complaint by the defendant is antedated, for the purpose of giving the plaintiff preference in the entry of judgment by default against the defendant, over another judgment creditor of the defendant, although the defendant might be estopped from questioning the date of the admission, not so with the subsequent judgment creditor, who is authorized to have the first judgment set aside on his motion as against his judgment.

The admission in this case did not state the *place* of service, so that upon the face of the papers there was no proof of service sufficient to authorize the entry of judgment. The Code says (§ 138), that "the admission must state the time and place of the service."

Oneida Special Term, December 1st, 1874.

MOTION by judgment creditor of defendant to set aside the judgment in the above action entered in favor of plaintiff prior to the judgments of the moving party.

Beardsley, Cookinham & Burdick, for motion.

Fiske & Ballou, opposed.

MERWIN, J. — On September 12th, 1874, the Utica City National Bank commenced two actions against the defendant, Fagan, by personal service of summons and complaint. About a week or ten days thereafter the plaintiff herein commenced an action against the defendant by service of a summons and complaint, and obtained from defendant an admission of service in the following words: "I hereby

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admit due and personal service of the within summons and complaint, this 10th day of September, 1874.

“KITTIE L. FAGAN, defendant.”

On the 1st day of October, 1874, an affidavit was made on behalf of the plaintiff, verifying the signature of the defendant to the admission of service, and also swearing that the affiant personally served the summons and complaint on the defendant, at Boonville, not stating the time.

It is found by the referee, to whom certain questions on this motion have been heretofore referred, that the affiant named in the affidavit did not make such service; but personal service seems in some way to have been made. On the 2d day of October, 1874, the plaintiff herein, upon the summons and complaint, admission of service, and affidavit above referred to, and the ordinary affidavit of default, entered judgment against defendant for \$530.34. On the third day of October, judgments were entered in the two actions in favor of the City Bank. The referee finds that the plaintiff's debt is good and valid, and that the admission of service was given by the defendant and obtained by the plaintiff, for the purpose and with the intention of obtaining a judgment before judgments were entered in behalf of the bank. The bank now moves to set aside the plaintiff's judgment as fraudulent and void.

It will be seen from this statement, that the validity of plaintiff's judgment depends upon the validity of the admission of service and the right of the parties to date it back far enough so that upon its face it would authorize the entry of judgment.

By section 138 of the Code, proof of the service of the summons and complaint may be made by the written admission of the defendant, in which case the section says: “The admission *must state the time and place* of the service.”

The admission, in this case, does not state the place of service, so that upon the face of the papers, there is no proof of

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service sufficient to authorize the entry of judgment. In this view of the case, the judgment was a nullity, within the opinion of ROSEKRAANS, J., in *Read agt. French* (28 N. Y., 295).

But let us see about the right of the parties to date back the admission, thereby overriding the rights of the bank acquired by the personal service in their cases. The Code provides two ways by which a debtor may in fact give a preference to a creditor, namely, by a confession of judgment and by offer. In these two proceedings the statute provides such safeguards as the legislature thought proper to impose; and a preference obtained in these ways, and in accordance with the provisions of the statute, would not in itself be fraudulent. The plaintiff, instead of taking either of the courses allowed by law, took one not provided for by any statute, and I see no ground it can stand upon, except that of estoppel.

Very likely the defendant would be estopped from denying that the service was not in fact made on the tenth September, the date of the admission. But this estoppel, it seems to me, cannot bind the judgment creditor who now moves. It had acquired certain rights by the service of its process. One of these rights was, that all future proceedings affecting defendant's property should be conducted according to law. If the defendant desired to make any preference, the creditor had a right to have it done legally and in accordance with the statute in such case provided.

As a precedent, the dating back cannot be sustained, when the rights of others have intervened. It would be liable to great abuse. I think there is no doubt as to the right of the judgment creditor to make this motion. It is within the principle of *Chappell agt. Chappell* (2 Kernan, 515).

The plaintiff's judgment must be set aside, as against the judgment of the moving party.

Hirsch agt. Livingston.

SUPREME COURT.

HENRY HIRSCH agt. WILLIAM S. LIVINGSTON, Executor, &c.,
JEREMIAH PANGBURN, Purchaser, appellant.

When purchaser at mortgage sale may refuse to take title.

Where a purchaser of a leasehold interest for a term of years at a mortgage foreclosure sale of premises in the possession of tenants at the commencement of the action, and who remain in possession at the time of the sale, but not made parties to the foreclosure proceedings, he is not bound to complete his purchase and take a title.

General Term, First Department, October, 1874.

DAVIS, P. J., BARRETT and DANIELS, JJ.

APPEAL from order by Pangburn, denying motion that the referee, making sale of mortgaged premises, refund the deposit made by the purchaser, pursuant to the terms of sale, and that he be discharged from his bid.

Aug. R. McMahon, for appellant.

M. S. Thompson, for respondent.

DANIELS, J. — The premises were sold under a foreclosure judgment, recovered by the plaintiff in this court in an action in his favor against William S. Livingston and another. The interest sold in them consisted of a term for years, created by a lease given by William B. Astor.

After the appellant had bid off the property, subscribed

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the terms of sale and paid ten per cent upon the purchase-price, he declined to take the title on account of certain restraints imposed by the lease, and because, at the time when the action was commenced there were tenants in possession of the demised premises, who ever since then continued therein, that were not made parties to the action and were not bound by the judgment.

These objections were verified by the affidavit of the appellant, and have not been denied on the part of the plaintiff. For that reason they must be assumed to be well founded in fact; and if they are, then the purchaser has shown that he could not, by any legal proceedings under the judgment, acquire possession of the premises sold him if he had taken a conveyance of the title. For, as the tenants were in possession when the action was commenced and since remained in possession, it is clear that they could not be forcibly dispossessed by any process which could be issued to enforce the judgment (*Fuller agt. Van Geesen*, 4 *Hill*, 171). If such a sale would give the purchaser a title, it would fail to confer any right of possession against the tenants holding the property; and that would deprive him of an important interest which he was justified in expecting would be acquired by his purchase. If the tenants were willing to yield up their possession to the purchaser at the foreclosure sale, that ought to have been shown as a fact by way of answer to his motion. As long as that was not attempted, it cannot be presumed for the purpose of compelling him to receive a title plainly defective. What he had a right to suppose he was to receive by means of the purchase was not merely a title to the interest sold, but beyond that, the power of securing immediate possession. If he could obtain the former the latter did not exist, because of the defective proceedings in the foreclosure action, and that, under the law governing the obligations of purchasers at foreclosure sales, in courts of equity, was sufficient to justify the appellant in his refusal to complete the purchase (*Moffatt agt. Mowatt*, 2 *Paige*, 586—

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590; *Veeder* agt. *Fonda*, 3 *id.*, 94; *Seaman* agt. *Hicks*, 8 *id.*, 655).

The order should be reversed, with ten dollars costs besides disbursements on the appeal, and an order should be entered relieving the purchaser from his bid, and directing the deposit made by him to be refunded by the referee.

DAVIS, P. J., and BARRETT, J., concurred.

In the Matter of Niles.

N. Y. COMMON PLEAS.

IN THE MATTER OF GEORGE W. NILES, ASSUMING TO PRACTICE
AS AN ATTORNEY OF THIS COURT.

An attorney at law debarred from practice, by reason of having been sent to state prison.

Attorneys and counsellors at law are classed as judicial officers, and subject to removal or suspension by the courts in which they shall be appointed, "for deceit, malpractice or misdemeanor," on charges preferred and opportunity given for defense. But every office becomes vacant on the removal of the incumbent or his conviction of an infamous crime.

Where an attorney and counsellor at law is convicted and sentenced to the state prison for an infamous crime, to wit: for extorting money from innocent persons by threatening, as attorney, to bring actions against them for alleged acts affecting their morals, &c., he ceases to be an attorney and counsellor under the operation of the statute, upon such conviction and his going to state prison. The statute declares that any one guilty of an infamous crime shall forfeit his office if he is sent to state prison.

General Term, January 18, 1875.

Before C. P. DALY, Ch. J., ROBINSON and J. F. DALY, JJ.

DALY, C. J. — We are satisfied upon the evidence before us that Niles was removed by the supreme court from the office of attorney and counsellor on the 3d of February, 1851. The evidence of it is, that after Niles' conviction for the offense for which he was sentenced to the state prison, an order of the general term of the supreme court, together with a copy of his conviction, was served upon him, requiring him to show cause, at the next general term of the court, why he should not be removed, and that the motion was made and granted appears by the affidavit of Henry Bertholf, who was

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then crier of the court, who swears that he was present in the court when N. B. Blunt, the district attorney, made the motion for the removal of Niles, and that it was granted. The fact further appears by the New York Herald of February 4, 1851, which gives a detailed account of what occurred in the general term on the previous day, February third — chief justice EDWARDS and justices EDWARDS and KING presiding — upon the hearing and granting of the motion removing Niles. In the New York Daily Tribune of February 5, 1851, it is stated, that on the previous Monday, February third, Niles was removed from the roll of attorneys and counsellors of the supreme court; that the motion was made by the district attorney, and that nobody appeared to oppose.

The papers upon which the motion was made are on file; but no order granting the motion can be found. After this long lapse of time, twenty-four years, the draft order, if one was made, may have been lost, destroyed or abstracted; of the entry of it I shall hereafter speak; but of the fact that the motion was made and granted there can be no reasonable doubt. It is further corroborated by the fact that like motions were made in this and in the superior court, and granted, as appears by the records of both courts.

In June, 1857, a motion was made in the supreme court that the order removing him be set aside as irregular and void, upon the ground that no charges had been served upon him, and that being in the state prison when the motion was made, he was unable to be heard in his defense. It was founded upon an affidavit of Niles, in which he swore that he was informed and believed that an order had been made and entered, at a general term of the court, on the 3d of February, 1851, depriving him of his right to practice as an attorney and counsellor. The motion was denied, the court holding that he had been duly served with a copy of the charges against him, and with the order to show cause; that he had had an opportunity of being heard in his defense, and that his removal from office was in all respects regular.

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On the 30th of December, 1859, another application was made; the matter was referred to a referee, and on the 23d February, 1863, a formal order was entered declaring that the court declined to take any further action in the matter.

In February, 1870, Niles assumed to act as an attorney, and brought a suit in the supreme court. A motion was made to set aside the summons upon the ground that he was not an attorney, which motion judge INGRAHAM denied upon the ground that the papers were not complete, because they did not contain the order of the general term removing Niles. Judge INGRAHAM, as appears from his opinion, thought the motion was not made, by the defendants in that action, in good faith, as he had no copy of that order in his papers. An appeal was taken to the general term, judges BARNARD and CARDOZO presiding, and judge INGRAHAM's decision was affirmed.

This decision neither declared that Niles had not been removed, nor was it a formal readmission of him as an attorney. It merely affirmed the decision denying the motion to set aside the summons for irregularity, as the papers did not contain the requisite proof of Niles' removal; *i. e.*, a copy of the order removing him. That order, or an authenticated copy of it, was the official and best evidence of the fact; and as that was not produced, nor its non-production accounted for, the conclusion appears to have been that the moving papers were defective for the want of proper evidence of Niles' removal. That was the ground assigned by judge INGRAHAM in his opinion, and, as his decision was affirmed by judges BARNARD and CARDOZO, without delivering any written opinion, it may be assumed that that was the ground also of affirmance.

There is no such question before us. The order would necessarily have been entered in the minutes of the court, but we have the certificate of the clerk of the court that he has caused a search to be made for the rough as well as for the regularly engrossed minutes of the year 1851, and that neither

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can be found; the explanation of which, probably, is that three years afterward, on the 19th of January, 1854, the building in which the supreme court was then held was entirely destroyed by fire, a fire by which, as appears by the proof before us, a great many of the records of the court were destroyed. This sufficiently accounts for the non-production of the order of the court removing Niles. If the books in which the minutes of the general term of February 3, 1851, were kept were in existence, the order, I doubt not, would be found duly entered; but the probability is, as I have suggested, that they were destroyed in the fire. It was, as I suppose, the circumstance of the discovery of the destruction of the record evidence which emboldened Niles in 1870, sixteen years after his release from the state prison, to commence practicing again as an attorney and counsellor in all the courts, upon the assumption that he had never been removed.

The order notifying him to show cause was served upon him on the 8th of January, 1851. On the thirteenth of that month he was sentenced to the state prison, and on the third of February following the motion for his removal was made and granted in the general term. He had five days, at least, before his sentence, to procure counsel to appear for him upon the motion, if he wished to be represented upon it — which it is evident he did not, for the obvious reason that he had nothing to say in opposition to it. He had been tried, and convicted of most flagrant acts in his professional character as an attorney, the punishment for which was imposed by his subsequent sentence to the state prison for two years and six months. That he was in state prison, and all his civil rights suspended, when the motion was heard and granted, is a point to which we attach no weight. The suspension of his civil rights did not give him any immunity from proceedings against him, nor suspend the rights of others (*Davis* agt. *Duffie*, 1 *N. Y. Court of Appeals Decisions* by *Abbott*, 486; *Id.*, 8 *Bosw.*, 619.)

A professional opinion of judge Bosworth that Niles is

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entitled to practice as an attorney and counsellor of the supreme court has been submitted to us. The judge was of the opinion that if an order had been made by the general term in February, 1851, removing Niles it would have been valid, as the papers served upon him presented facts which authorized his removal, and that the court was competent to make such an order; but he thought, upon the facts stated to him, that the inference must be that no such order was made. He had not before him all the evidence that we have. In the inquiry before us the non-production of the order is accounted for, and we have the sworn statement of the crier of the court that he was present when the motion was made, and heard the decision pronounced—a statement so fully sustained by other evidence as to leave no room for doubt.

By the act of 1862 (*Laws of N. Y.*, p. 971) it is a misdemeanor, punishable by fine and imprisonment, for a judge knowingly to allow any person to practice in the courts of this city who has not been regularly admitted to practice. It may be that Niles is not within the letter of the statute, having been regularly admitted; but, if it be an offense to suffer a person to practice who has not been admitted, how much graver, within the spirit of this statute, would be the offense, in a moral point of view, if we were to allow a man to practice who was stripped of his office, upon his being convicted and sent to the state prison for extorting money from persons by threatening, as attorney, to bring actions or prosecutions against them for alleged acts affecting their morals, and who, although entirely innocent, complied with his demands rather than endure the exposure and scandal incident to the public vindication of their characters?

Our conclusion is, that Niles was deprived of his office of attorney and counsellor of the supreme court by a proceeding in all respects regular and valid; that he has not been readmitted, and that he is not entitled to practice in this or in any other court in this state

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ROBINSON, J.—While concurring entirely in the views expressed by the chief judge, mine are also more radical. Niles, being an attorney of the supreme court, was convicted of obtaining goods under false pretenses, and sentenced to state prison for an infamous crime, and there worked out his sentence. His conviction has never been reversed. Under these circumstances, I am of opinion — without consideration of any action of the supreme court to remove him, which, nevertheless seems to have been effectual — that he is not qualified to practice as an attorney and counsellor in this state; and for these reasons:

Attorneys and counsellors are, by the statutes, enumerated among the class of public officers known as judicial (1 *R. S.*, 98), and subject to removal or suspension. Their tenure is for life (1 *R. S.*, 109, *sec.* 23). They may be so removed or suspended by the courts in which they shall be appointed, “for deceit, malpractice or misdemeanor,” on charges preferred and opportunity given for defense (1 *R. S.*, 109, *sections* 23 and 24). But every office becomes vacant on the removal of the incumbent or his conviction of an infamous crime (1 *R. S.*, 122, *sec.* 84, *subs.* 3, 5), while obtaining goods under false pretenses has been held not to be a felony (*Fassett agt. Smith*, 23 *N. Y.*, 252). An infamous crime is one punishable with death or imprisonment in a state prison (2 *R. S.*, 702, *sec.* 31).

A sentence for imprisonment for any term less than life suspends all the civil rights of the person so sentenced, and forfeits all public offices, and all private trusts, authority or power during the term of such imprisonment (2 *R. S.*, 701, *sec.* 19). This latter limitation, during the term of such imprisonment, can have no reference to an office forfeited, but applies to private trusts, &c. To hold that a judge of this court, elected for fourteen years, sentenced to prison for two or three years might, on the expiration of his sentence, again resume the judicial functions of his office, would be preposterous. The sentence forfeited Niles’ office, and a proper

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construction of the provision would, at most, restore his capacity after the term of his sentence had expired, to be again elected or appointed. By such conviction his office as attorney and counsel became vacant (1 *R. S.*, 122), and his sentence forfeited it (2 *R. S.*, 701). A pardon by the governor only would have restored his competency to testify (2 *R. S.*, 701, *sec.* 23), or had capacity thereafter to be elected or appointed to some office or trust; but could by no retroaction restore him to any office he had either vacated or forfeited.

The order of the superior court, January, 18, 1851, was granted on mere production of the conviction and sentence.

Having thus ceased to hold such office of attorney and counsel he cannot be allowed to practice without readmission by the supreme court, which is not pretended.

DALY, *C. J.* — Judge DALY and myself also record our concurrence in the views taken in the opinion of judge ROBINSON. We give it as the united opinion of the court, on all the grounds stated, that he was properly removed; that, in other words, he ceased to be an attorney, under operation of the statute, upon his conviction and his going to state prison. But we are satisfied, even if he had not been removed, that he could not practice. The statute declares that any one guilty of an infamous crime shall forfeit his office if he is sent to state prison. In the cases in which Mr. Niles has appeared here —

Mr. Niles (interrupting) — Will your honor take them on submission?

DALY, *C. J.* — Yes; under the circumstances, we will take them on submission.

Mr. Niles here handed up the papers relating to the cases in which he appeared, and the proceedings terminated.

ORDER OF THE COURT

IN THE MATTER OF GEORGE W. NILES.

At a general term of the court of common pleas for the city and county of New York, held January 13, 1875.

Present — Hon. C. P. DALY, Chief Judge; Judges ROBINSON, LARREMORE, and J. F. DALY.

GEORGE W. NILES having appeared in this court, and having assumed to act as an attorney and counsel in several cases before the court, the court directed him to state by what authority he acted as an attorney and counsellor, and if he had been readmitted as such.

On reading the certificate of his conviction on the trial of indictment for obtaining money by false pretenses, in the court of general sessions of the peace, held in the city of New York on the 30th day of December, 1850; and the service of an order of the supreme court of the state of New York, of the first judicial district, upon the said Niles, to show cause why he should not be removed from practicing as an attorney, solicitor and counsellor, in any of the courts of this state, on the 7th day of January, 1851; also the affidavit of H. Bertholf, crier of the supreme court, showing that he was removed by the said court; and the order of the supreme court, dated December 30, 1851, referring it to Hon. Wm. Mitchell, to inquire as to the moral character of said Niles, and to report whether, in his opinion, the rule removing him should be vacated; and the communication to the said court by the said Wm. Mitchell, dated September 28, 1860, concerning the same; and on reading the

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affidavits, orders and motion papers in the action wherein George V. House was plaintiff against John W. Porter defendant, and the orders of the court made therein; and the orders of the general term of the supreme court, dated September 16, 1857, denying the motion to restore his name to the roll of attorneys, &c.; and the affidavits and orders made and granted by this court in the action between Thos. Butler, plaintiff, against Wm. Lee, defendant, with the notes of testimony taken before Thos. W. Clerke, referee, appointed by the court March 20, 1874, and the report of the said referee, not yet filed; and the affidavit of B. W. Buchanan; the certificate of the county clerk, dated January 11, 1875; and on reading and filing the affidavit of said Niles, dated January 13, 1875; and this court having heard the said Niles in reference to his right to appear as attorney and counsellor in this court; and on reading and filing the affidavit of A. Oakey Hall, Esq., dated the 15th January, 1875:

It is ordered and adjudged that said George W. Niles, on the 3d day of February, 1851, was removed by the general term of the supreme court, of the first judicial district, from his office as attorney and counsellor of this state, and that since the conviction and sentence of the said Niles, his office as attorney and counsellor became vacant, and was forfeited by him; that he has not been readmitted, and that he has no right to appear as an attorney and counsellor at law in this court, or in any court of this state.

Enter.

CHAS. P. DALY,
Chief Judge.

 Campbell agt. Campbell.

SUPREME COURT.

SARAH M. CAMPBELL agt. IOYNTHIA S. CAMPBELL *et al.**Partition — commissioners' fees.*

Commissioners appointed to make partition of real estate are not entitled to more than two dollars per day for each day *actually* and *necessarily* employed in the business of such partition, besides their actual and necessary disbursements, even where they are also directed to sell a portion of the property.

Each commissioner is entitled to compensation at that rate only for the time he was actually and necessarily employed in the duties of his office. The affidavits used on a motion to adjust the fees and expenses of commissioners must show, in detail, the number of day's service actually and necessarily performed by each commissioner, and, also, the actual disbursements made by the commissioners, together with the necessity of incurring them.

New York Special Term, October, 1874.

MOTION for an order directing the county clerk to tax the commissioners' fees and expenses at \$1,683.02.

Three commissioners were appointed in this action to divide the property described in the complaint, which consisted of thirty-seven lots, situate in the counties of New York and Queens. They were afterward directed to sell the two lots which could not be partitioned. In their bill of costs, &c., on this motion they claim as follows:

Receiving order of sale and posting notices.....	\$10 00
Attending sale, at ten dollars each.....	30 00
Paying surplus to county treasurer.....	3 00
Commissions on amount realized at sale, about....	878 00
Expenses	312 02

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The other charges appear more fully in the opinion below

V. M. Osborn & John L. Hill, for motion.

W. S. Gibbons & W. S. Palmer, opposed.

LAWRENCE, J. — The Revised Statutes prescribe that the fees of commissioners appointed to make partition or admeasure dower shall be "for every day's actual and necessary service, two dollars to each commissioner" (2 *R. S.*, 643, § 2).

I do not think that the affidavits read, on behalf of the commissioners, show that the commissioners were actually and necessarily engaged seventy-five days in making the partition in this case; and it does not seem that such a length of service could have been required in the partition of thirty-seven lots of land.

The act of 1869 does not avail the commissioners, because it has been declared to be unconstitutional by the court of appeals (*Gaskin agt. Meek*, 42 *N. Y.*, 188).

No greater sum can be allowed to the commissioners than two dollars for each and every day's actual and necessary service.

Objection has also been made to several items of disbursements claimed by the commissioners, on the ground that the same have not been properly verified, and have not been necessarily incurred.

These items must be verified, and the necessity of incurring them must be shown.

The motion to adjust the fees and disbursements of the commissioners at the amount specified in the schedule annexed to Mr. Smith's affidavit is, therefore, denied, without costs, but with leave to renew on two days' notice on further affidavits, showing in detail the number of days' service actually and necessarily performed by each commissioner, and also showing the actual disbursements made by said commissioners.

Shelton agt. Merchants' Dispatch Transportation Co.

COURT OF APPEALS.

HENRY S. SHELTON, respondent, agt. THE MERCHANTS' DISPATCH TRANSPORTATION Co., appellants

Evidence improperly rejected respecting the contract for the shipment of goods.

The seller of goods acts as the agent of the purchaser in the contract for their shipment by a common carrier. And the authority constituting this agency extends to the mode and manner or habit of dealing between the agent and the carrier in procuring a bill of lading from the carrier, although it is procured several days after the goods have been delivered to the carrier, and the carrier's receipt therefor given to the shipper, the agent, and the goods sent away, and although such bill of lading limits the common-law liability of the carrier by excepting a particular risk. The rejection on the trial of any testimony tending to prove this method or habit of doing business between the shipper, the agent, and the carrier, is error, because it is essential to the disclosure of the actual contract between the parties.

December, 1864.

APPEAL from a judgment of general term, first judicial district,

Hamilton Cole, for appellant.

W. H. Arnoux, for respondent.

JOHNSON, J. — The referee refused to find that previous to the shipment in question, H. B. Clafin & Co. had been large shippers by the defendants' line, and had been always accustomed to obtain bills of lading for the goods shipped; and also that the defendants were carriers upon a route termi-

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nating at Chicago, and not extending to Janesville, Wisconsin, and that between the latter points transportation had to be performed by separate and independent carriers. These matters the referee refused to find, on the ground that they were immaterial to the rights of the parties. In this, we think, he erred, and for the following reasons: Claffin & Co. were the agents of the plaintiff in respect to the transportation of the goods in question. His directions to them were to ship the goods to him at Janesville, Wisconsin, by the defendants' line. The extent of the authority thus conferred was considered in *Nelson agt. Hudson R. R. R. Co.* (48 *N. Y.* 498). It necessarily extends to the making of such contracts as the agents, in the honest exercise of their discretion, see fit to make. The fact that the carriers and the agents employed have a habitual course of dealing in respect to contracts for transportation is a material and important element in determining the construction to be put on their acts in any particular case (*Mills agt. Michigan Cent. R. R.*, 45 *N. Y.*, 622).

The delivery by the agents of the plaintiff to the carrier was made upon no particular agreement made at the time. The packages were marked with the address of the plaintiff, and receipts were signed by the agents of the defendants at their receiving depot at New York.

These receipts were in a bound receipt-book belonging to Claffin & Co., filled up by them, and signed by the agents of the defendants. They purport to be receipts, and not contracts for carriage. They were in the following form: "New York, Oct. 2, 1871. Received from H. B. Claffin & Co., in good order, on board the *M. D.*, for ———, the following packages: One case D. G. marked H. S. Shelton, Janesville, Wis.," and were signed "Gleason." In a day or two, but after the packages had been started on their way, the agents of the plaintiff, acting in accordance with the habitual mode of doing this business, sent the receipts to the defendants' office, and procured bills of lading for the goods,

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the giving of which was entered on the several receipts. These bills of lading expressed the actual contract of carriage between the parties who, in fact, made the contract—the defendants on the one hand, and H. B. Claffin on the other. When the goods were delivered and the primary receipts given, each of the parties was acting in an habitual method, and with an habitual understanding of what they were engaged in doing. The receipts were presented and signed with the view and expectation, on both sides, that bills of lading were, in the usual course, to be subsequently issued, expressing the intentions and engagements of the parties.

This was their method of dealing, distinctly in their contemplation from the beginning, reasonable in itself, and completely within the authority committed by the plaintiff to his agents, H. B. Claffin & Co. Any attempt on their part to claim a different agreement would have been an act of bad faith, because it would have been a departure from the understanding based upon the previous course of dealing of these parties. In the view we take of the relations and acts of these parties, the matters of fact which the referee held to be immaterial were plainly material, because they were essential to the disclosure of the actual contract of the parties. The bills of lading were obtained by the plaintiff's agents in the exercise of their original authority to contract with the defendants for transportation, and these controlled the rights of the parties, and displaced the common-law relation which otherwise might have existed between them.

The order of time in which the business was actually transacted cannot be allowed to affect the rights of the parties. If H. B. Claffin & Co. were originally authorized to ship on bills of lading limiting the common-law liability of the defendants, the fact that receipts were taken in one stage of the business, intended by neither party as completing their dealing or contract, did not exhaust the authority.

It was never so intended, and cannot have that effect. The acts of the parties must have operation as they were intended

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by the parties when they were done. The bills of lading excepted the risk of fire, and as it was by that danger that the property in question was destroyed, the defendants are free from liability, at least, unless the loss was due to their negligence or fault. The only suggestion of fault is, that the cars containing these packages were unloaded on Sunday in Chicago. The case does not inform us that by the law of Illinois, where the loss happened, unloading cars on Sunday was unlawful, and we have no means of knowing such to be the fact in respect to the laws of that state.

The common law, at least, teaches no such doctrine.

The judgment ought to be reversed and a new trial ordered, costs to abide the event.

All concur.

Lupton agt. Smith.

SUPREME COURT.

WILLIAM LUPTON, appellant, agt. FREDERICK W. SMITH AND
JAMES LUPTON, respondents.

Manner of issuing attachments to enforce choses in action.

An attachment in aid of an attachment brought to enforce choses in action, upon which an attachment has been levied, must be brought in the name of the sheriff or in the name of the debtor in the attachment.

The provision of the Code (section 238), that actions may be prosecuted by the plaintiff in the attachment, do not authorize the plaintiff to bring them in his own name, but enables him to take the control of such suits when brought by the sheriff, or to bring the same in the sheriff's name on executing the bond of indemnity to the sheriff required by said section.

General Term, First Judicial Department, January, 1875.

THIS is an appeal from an order setting aside an attachment against the property of the defendants. A motion was made on the part of the defendants to vacate the attachment, which was denied. A motion was then made for a reargument, which was granted; and on the reargument the attachment was set aside.

The attachment was granted on an affidavit of the plaintiff, which states that the defendants are indebted to James and John Fletcher in the sum of \$5,000 and interest; that the defendants brought an action in this court against John and James Fletcher, in which a warrant of attachment was issued; that the sheriff demanded and obtained from the defendants a certificate, pursuant to section 236 of the Code,

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stating they were indebted to said James and John Fletcher in the sum of or about \$5,000.

That the plaintiff has delivered to said sheriff the undertaking required by section 238 of the Code.

That the *defendants* are about to dispose of their property.

That the said James and John Fletcher both reside in England.

The undertaking delivered to the sheriff provides "that the said plaintiff, William Lupton, will indemnify the said sheriff from and against all damages, costs and expenses on account thereof not exceeding \$250."

It does not appear that any undertaking was delivered indemnifying the *defendants* or providing for the payment of their costs and all damages which they may sustain, as required by section 230 of the Code.

J. H. & B. F. Watson, for appellant.

First. No affidavits were served on said motion to vacate said attachment, therefore the defendants must be confined to the ground taken by them that no cause of action is shown.

Second. There being no dispute about the facts, the only legal question in the case is whether the plaintiff can maintain this action in his own name, or whether it should have been brought in the name of the sheriff. The language of the Code is plain and explicit. "*The actions, &c., may be prosecuted by the plaintiff*" (*Code of Pro.*, § 238; *Skinner* agt. *Stuart*, 24 *How.*, 489; 15 *Abbott*, 391; 39 *Barb.*, 206; *Millbank* agt. *Broadway Bk.*, 3 *Abb. [N. S.]*, 223; *Andrews* agt. *Glenville Co.*, 11 *id.*, 78; *O'Brien* agt. *Glenville Co.*, 50 *N. Y. R.*, 128; *The Mech. and Tr. Bank* agt. *Dakin*, 50 *Barb.*, 587; *id.*, 51 *N. Y. R.*, 519; *Thurber* agt. *Blanck*, 50 *id.*, 80).

C. Bainbridge Smith, for respondents.

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First. The judge had no power or authority to grant the attachment in this action.

1. This section (238) does not authorize the plaintiff to bring an action in his name. The actions to be brought by the sheriff may be *prosecuted* by the plaintiff or under his direction; but this section does not expressly or impliedly confer upon the plaintiff any right to bring such actions in his name (*Code of Pro.*, § 238).

2. There is no privity of contract between the plaintiff and the defendants' debtors. There was no cause of action existing in favor of the plaintiff against the defendants (*Id.*, § 229).

Second. The property attached by the sheriff, which is the subject of the present action, was in the custody of the law, and the sheriff is bound to preserve it; and when judgment is obtained, he is to apply the proceeds (*Id.*).

Third. The action should have been brought in the name of the sheriff (*Van Valkenburgh* agt. *Bates*, 14 *Abb.* [*N. S.*] 314, *note*; *Mech. Bk.* agt. *Dakin*, 50 *Barb.*, 587; *id.*, 51 *N. Y. R.*, 519; *Thurber* agt. *Blanck*, 50 *id.*, 80; *Skinner* agt. *Stuart*, 39 *Barb.*, 206; *S. C.*, 15 *Abb.*, 391).

DAVIS, P. J.—The appeal in this case presents a single question and that is, whether, under section 238 of the Code of Procedure, the plaintiff in attachment cases may, by giving the bond therein provided, prosecute in his own name the action which the sheriff is authorized to bring by sections 232 and 237 of the Code. This question has received consideration in various cases, and conflicting views have been expressed upon it. In *Skinner* agt. *Stuart* (39 *Barb.*, 216) the point was not directly involved, because that was an action brought by the plaintiff in attachment proceedings to compel the delivery of tangible property to the sheriff; but CLERKE, J., in his opinion, discusses the effect of section 238, and expresses the conclusion that debts, credits and effects may be collected in actions brought in the name of the attaching creditor, on

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giving the bond. In *The Mechanics' Bank agt. Dakin* (50 Barb., 587) the question was not directly involved, but LEONARD, J., examined it and came to a conclusion directly the reverse of that expressed by Mr. Justice CLEEKE. In *Millbank agt. The Broadway Bank* (3 Abb. [N. S.], 223) the only question to which the attention of the court seems to have been called was whether, in an action pending in the name of the plaintiff, the bond to the sheriff could be filed *nunc pro tunc*. The court, INGRAHAM, J., held that, under sections 173 and 174 of the Code, the power to relieve from the consequences of such an omission existed. What would have been the views of the learned justice on the question now before us, if the point had been raised, is at most mere matter of inference from the order granted.

The point was only incidentally alluded to in *O'Brien agt. The Glenville Woolen Co.* (50 N. Y., 128, and in 51 N. Y., 519), in which the court of appeals and the commission of appeals appear to be in conflict upon the question really involved in those cases. Nowhere do we find the question so directly presented as in *Van Valkenburgh agt. Bates*, in the New York superior court at special term (*reported in note to O'Brien agt. The Mechanics and Traders' Fire Insurance Co.*, 14 Abb. [N. S.], 314), in which VAN VORST, J., in a clear and able opinion which reviews all the authorities, comes to the following conclusions:

1st. That an action in aid of an attachment, brought to enforce choses in action upon which an attachment has been levied, must be brought in the name of the sheriff or in the name of the debtor in the attachment.

2d. That the provision of the Code (*section 238*), that actions may be prosecuted by the plaintiff in the attachment, do not authorize the plaintiff to bring them in his own name, but enables him to take the control of such suits when brought by the sheriff, or to bring the same in the sheriff's name on executing the bond of indemnity to the sheriff required by said section.

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These conclusions have our full concurrence ; and the reasons set forth by the learned judge in his opinion, as we think, lead irresistably to the result at which he arrived.

We adopt them as our own, and, in consequence, affirm the order appealed from, with ten dollars costs of the appeal, besides disbursements.

C. DONOHUE, J., concurs.

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SUPREME COURT.

CHARLES G. CLARK agt. MARTHA ELLERY COLES, Executrix,
and EDWARD COLES and WILLIAM H. NEILSON, Execu-
tors, &c., of ISAAC W. COLES, deceased.

*When an injunction will not issue at the suit of an heir at law to restrain the
executors in the management of the estate.*

Where, by the provisions of the will, after the devise of a few legacies, the whole income of the estate, both real and personal, is devised to the widow during her life, and who has collected the income of the estate and managed the same, she being also an executrix under the will, an heir at law, who refused to come in and accept the terms of settlement of the estate made with the widow and all the other children, cannot have an injunction to enjoin the executors from paying over any of the rents, profits or other periodical income to the widow until certain taxes and assessments on the estate shall have been paid and certain tax sales redeemed, &c.

1st. Because the executors and executrix, whilst authorized by the will to "lease, sell, convey and dispose" of all or any part of the real estate of the testator, are not required so to do, and in fact have not exercised the power, but the income has been appropriated by the widow in her individual and not official capacity.

2d. Neither by the will is there any trust estate created in the defendants as executors and executrix, nor has there been any such power in fact exercised or claimed, and the issue of an injunction as asked would assume the contrary.

Chambers, July 25, 1874.

MOTION by the plaintiff for a temporary injunction against the defendants.

W. H. Peckham, for plaintiff.

Mr. Coles, for defendants.

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WESTBROOK, J. — The plaintiff was the husband of Elizabeth C. Coles, deceased, who was one of the children and one of the devisees of Isaac W. Coles, the above named testator. The share of Elizabeth in her father's estate having passed by her will to the plaintiff, he, claiming that the whole income of the estate is received by the defendant Martha Ellery Coles, and used by her without paying taxes and assessments upon certain real estate, which belongs to him as a part of the property of his deceased wife, after the termination of the life estate, asks that the "defendants shall be adjudged as executors and executrix to apply the income of said estate to the payment of taxes and assessments on said real estate already accrued, and to redeem the said real estate from any tax or assessment sales, and to keep down all taxes and assessments in the future, during the continuance of the said life estate of the said defendant, Martha Ellery Coles, and that defendants be enjoined from paying over any of the said rents, profits or other periodical income to the defendant Martha Ellery Coles, until the whole of said taxes and assessments shall have been paid and said tax sales redeemed; and thereafter from paying any portion thereof, until after the payment of any taxes and assessments that may be due at the time of the receipt thereof."

A preliminary injunction, in conformity with the prayer of the complaint, is now asked in behalf of the plaintiff and opposed by the defendants.

From the foregoing statement of facts it will appear that the plaintiff's complaint is framed upon the theory that the defendants, in their capacity as executor and executrix of the will of Isaac W. Coles, deceased, are by such will charged with the management of his estate, having the power to collect and apply its income. A reference to the will, however, will show that there is no trust whatever created. On the contrary, the devise of the income of the estate is directly to her without the intervention of a trustee, for the will, after the devise of a few legacies, declares: "I do hereby give, devise and

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bequeath to my said wife the rents, interests, dividends and other periodical income of all and singular the rest, residue and remainder of my estate, both real and personal, that I may be seized or possessed of at the time of my decease, for and during the residue of her natural life, provided she shall so long continue and remain my widow. * * * But should my said wife marry again, then, and in that case, I do hereby give, devise and bequeath to her from and after her remarriage the rents, interests dividends and other periodical income of one equal third part of the said rent, residue and remainder of my estate, both real and personal, for and during the residue of her natural life," &c. The widow, now seventy-four years old, has never remarried. The children of Isaac W. Coles in the year 1865, they having then all become of full age, made a friendly division of the real estate of their father, subject, however, to the life estate of their mother. The mother released her life estate in the property thus divided to each of the children, except that which fell to the share of the wife of the plaintiff. The offer to release to the plaintiff her interest in this part also was made to him, but was not accepted.

Since the death of Isaac W. Coles, the widow, by her duly authorized agent, has collected the income of the estate, and managed the same. The defendants, as executors and executrix as aforesaid, whilst authorized by the will to "lease, sell, convey and dispose" of all or any part of the real estate of the testator, are not required so to do, and in fact have not exercised the power; but the income has been received and appropriated by the widow, in her individual and not official capacity.

Neither by the will then is there any trust estate created in the defendants as executors and executrix, nor has there been any such power in fact exercised or claimed, and the issue of an injunction as asked would assume the contrary. I am aware that a plaintiff is not limited to the precise relief asked, but am not of the opinion that this plaintiff can have

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any relief against Martha Ellery Coles, as an individual, in this action, and especially on this motion, which she is asked to resist in her representative character and not as an individual. Other facts may exist which she would wish to show if she, personally, were summoned to show cause against an injunction, which, owing to the form of the action, her counsel may deem unnecessary now to interpose by way of answer to this application.

There are grave difficulties attending any action which may be brought against Martha Ellery Coles as an individual, and what relief, if any, and from what fund, the plaintiff is entitled to. These questions are not discussed.

The motion of the plaintiff for an injunction is denied with ten dollars costs, upon the grounds already stated.

Kelly agt. Taintor.

NEW YORK SUPERIOR COURT.

JOHN KELLY agt. HENRY F. TAINTOR.

Action of libel — demurrer to answer.

A defendant in an action for libel may allege the truth of the publication or that it was privileged.

Where the facts stated in a subdivision of the answer do not bring the alleged libelous matter within any of the classes of privileged communications, it cannot be sustained on demurrer as a privileged communication.

The matter stated, however, if it fails to justify the libel, may be given in evidence to mitigate the damages, if it has been pleaded separately for that purpose.

Where the answer alleged that the article, on which the complaint is founded, is, as to the matters complained of, true, "according to the true intent and meaning thereof;" *held*, the defendant had the right to allege the truth as a defense, and that the mere surplusage of the last words, quoted, did not render it a defective pleading.

Special Term, January, 1875.

DEMURRER to the answer. The action is for a libel.

The complaint alleges that the defendant falsely, and with malice, wrote, and caused to be published in the New York Tribune, a letter addressed to the editor of said paper, which, among other things, charged, as is alleged, that the plaintiff had been implicated in certain fraudulent transactions, by which the city of New York had been defrauded out of large sums of money; that the plaintiff had been engaged in wrongfully obtaining money from said city in connection with the "ring rogues," and in sharing and receiving moneys that had been fraudulently and corruptly obtained from the city; and had been a confederate with the persons who, by

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fraud, had obtained the same; that he shared in the bill of one Roe, and in the division of the money fraudulently obtained thereon; and that, by reason of such acts, the plaintiff should be regarded by the public as a dishonest man, and a sharer of money dishonestly obtained.

The defendant, as a separate defense, alleged that, in discharge of a public duty, he addressed a communication to W. F. Havemeyer, then mayor of the city, containing a statement that two checks, amounting to \$15,599, which had been paid, had been deposited to the credit of the plaintiff, and requesting the mayor to give the plaintiff an opportunity of explaining the transaction. That thereafter the plaintiff published an article in the Tribune, asking why it was that defendant had not called directly upon the plaintiff for an explanation, and denouncing the defendant as an obsequious sycophant who had not the courage or the honesty of purpose to do so; which words the defendant alleged were libelous. That thereafter he, the defendant, published the said article in the said newspaper, but which contained a further statement to the effect that he regretted that the plaintiff had not appreciated his charity in affording him an opportunity by the mayor to explain the transactions.

For a further defense, the defendant alleged that the letter mentioned in the complaint was published as part of a public discussion having reference to politics, and, when taken in connection with the prior publications referred to, could not be held to be libelous.

And, for a further defense, the defendant alleged that the article on which the complaint is founded, is, as to the matters complained of, true, "according to the true intent and meaning thereof."

The plaintiff demurred to each of these defenses for insufficiency.

G. W. Wingate & H. L. Clinton, for plaintiff.

L. De Kay & W. H. Peckham, for defendant.

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MONELL, *C. J.* — A defendant in an action for libel may allege the truth of the publication, or that it was privileged. These are defenses.

The defendant claims that both are raised by his answer.

First, that, under the facts stated, the communication was privileged; and, second, that the alleged libelous matter was true, "according to the true intent and meaning thereof."

I do not find that the facts stated in the "sixth" subdivision of the answer brings the alleged libelous matter within any of the classes of privileged communications. It does not relate to any legislative or judicial proceeding; nor is it a private communication which may sometimes be published under some peculiar duty or privilege of confidence.

In respect to legislative or judicial proceedings, it is provided by statute that a fair and true report shall not subject the reporter to an action. But in that case, and in all cases of a privileged communication, if express malice is shown, the action will lie.

The matter alleged by the defendant did not relate to any public proceeding. The charges were that the plaintiff had been implicated in certain frauds by which the city of New York had been defrauded of large sums of money, through or by which frauds the plaintiff had obtained portions of such sums. It is not alleged that any criminal proceeding, or civil action, had been commenced against the plaintiff in respect to such alleged frauds, nor that in any way it had been made the subject of any judicial, legislative or other public or private investigation. The charge, therefore, must be presumed to have emanated directly from the defendant, and he must be held responsible, unless he can justify its publication by establishing its truth. He cannot claim that it was privileged.

The matter stated, however, if it fails to justify the libel, might be given in evidence to mitigate the damages, if it had been pleaded for such a purpose.

In *Fink agt. Justh* (14 Abb. [N. S.], 107), it was held that matter, claimed to go in mitigation of damages, must be

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alleged separately from matter claimed to be a justification ; and the same rule applies where the same matter is intended to be used for both purposes.

The demurrer to the sixth and seventh defenses is well taken.

The allegation constituting the eighth defense, I think, is sufficient.

The truth of the matters complained of is averred "according to the true intent and meaning thereof." That must be, of course, according to their legal signification, intent, and meaning, which is a question of law ; and the interpretation cannot be governed or controlled by any hidden or intended meaning of the defendant. Hence the words, "according to the true intent and meaning thereof," must be regarded and claiming to give to them nothing more or less than their legal meaning, and might as well have been omitted.

But the allegation is, in effect, that in the legal signification of the matter it is true, and the defendant has the right to allege the truth as a defense ; the mere surplusage does not render it defective as a pleading.

The demurrer to that defense is not well taken.

The plaintiff must have judgment upon the demurrer to the sixth and seventh defenses, and the defendant must have judgment upon the demurrer to the eighth defense.

The defendant may have leave to amend his answer by setting up the matter in mitigation of damages.

Dinsmore agt. Adams.

SUPREME COURT.

WILLIAM B. DINSMORE and others agt. ALVIN ADAMS and others.

Control of the court over its own judgments — sufficient notice to move to vacate.

The court has control over its own judgments and decrees, and will vacate a decree which has been improperly obtained, upon such notice as in view of the circumstances of each case may be deemed just and proper. This power is inherent in the court and is not limited by section 174 of the Code, which has reference merely to ordinary defaults.

Where, on a motion to vacate a judgment or decree, the affidavits are conflicting, the court must look to the record and the undisputed facts.

New York, at Chambers, October, 1874.

MOTION by defendants to vacate a judgment.

BARETT, J. — The legal objections which have been raised upon the plaintiff's behalf are untenable. The court has control of its own judgments, and will vacate a decree which has been improperly obtained, upon such notice as, in view of the circumstances of each case, may be deemed just and proper. This power is inherent, and is not limited by section 174 of the Code, which has reference merely to ordinary defaults.

The real question is, whether the moving parties have made out a case for the exercise of this power. The affidavits are conflicting, and the court must look to the record and the undisputed facts.

It appears that many of the shareholders believed, upon information which they claim to have received from directors and agents of the company, that the transfer, through Plant,

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to the Southern Express Company was merely an arrangement to prevent confiscation, and to secure the property for the benefit of such shareholders. For sometime previous to the commencement of this action these shareholders had been expecting a distribution of the stock of the Southern Express Company. Of these facts the plaintiffs were aware. This is evidenced by the charges contained in the Einstein complaint, and by the receipt of the protest of July 16, 1869. Indeed, the testimony upon this head is scarcely conflicting. Mr. Sanford, in his affidavit of September 26, 1873, admits that, at one time, "many of the shareholders supposed that the property sold to Plant might not be paid for, and that the Adams Express Company might have to take, in payment therefor, some interest in the Southern Express Company." He further quotes, from his counsel's brief, a statement to the effect that, while the trustees denied having stated that the Adams Express Company owned the Southern Express Company, yet it was not impossible that conversations were had with reference to the interest of the Adams in the Southern Express Company. Mr. Dinsmore, in his affidavit of October, 1870, refers to the interest which the plaintiffs had in the Southern Express Company "for securing therefrom the aforesaid amount of the aforesaid, purchase-money." As it does not appear that the shareholders were ever directly and specifically advised of the alleged payment of the Plant notes; that the dividends of which they had been in receipt were derived from that source, and that, consequently, there was no further claim upon the Southern Express Company; it is fair to conclude that the trustees were aware of the continued hopes and expectations of their *cestui que trust*.

The point to be decided, therefore, is not whether the shareholders had any just foundation for their belief and hope — not in fact whether the transfer, through Plant to the Southern Express Company, was sham or genuine, nor whether the plaintiffs, as special trustees, had anything to do with the matter, nor yet whether the transfer can be attacked and the

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property or stock recovered in this action, but whether the plaintiffs, knowing the expectations of these shareholders, have prevented them by unfair means from at least making the attempt in this action to realize such expectations, or to hold the plaintiffs responsible for their non-realization.

It may be there was no general duty imposed upon the plaintiffs to disclose to their *cestui que trust* the nature and object of the Einstein suit; none, perhaps, to spread upon their complaint the fact that there was to be no distribution of the stock of the Southern Express Company. But when the trustees requested the shareholders to place themselves in the hands of the legal gentlemen who were their own counsel and the plaintiffs' attorneys of record in the suit, there at once arose a special obligation to make the fullest disclosure of every fact and circumstance which, if known, could possibly have influenced the judgment of these shareholders upon the important question presented to them, viz., the wisdom of intrusting their rights upon a final accounting which was to involve the ultimate release of their trustees, substantially to these trustees themselves.

With reference to this request, the plaintiffs should have distinctly stated in their circular that the attorneys, to whom they referred, were their own attorneys and counsel in the suit; they should not have left the discovery of that fact to the chance of the examination of the accompanying summons and complaint; they should also have given information as to the precise nature and object of the Einstein suit. Then, too, the fact with respect to the payment of the Plant notes, and that nothing further was to be hoped for in that quarter, or from the Southern Express Company, should have been circumstantially disclosed. This was not done. On the contrary, the complaint and circular were entirely silent with respect to Plant or the Southern Express Company, and the allusion to the Einstein suit was guarded and incidental.

The Einsteins were not referred to by name, but as "three of the defendants as plaintiffs," the gravamen of their charges

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was omitted, and all that was said upon the subject was that they had "prayed for an accounting concerning the trust fund." Considering the real character of the Einstein suit, all this could only tend to mislead the shareholders, and to keep them from making inquiries which might have resulted not only in their refusal to accede to the plaintiffs' request, but in their joining the Einsteins, or otherwise seeking to prevent the plaintiffs' release.

In this connection, the previous silence of the plaintiffs, upon the request of an interview by certain shareholders, and again in the face of the formal protest of July 26, 1869, acquires special significance.

It characterizes the incidents which have been adverted to in the conduct of the suit, and indicates a settled and long existing purpose to keep the shareholders in the dark as to their rights in the Southern Express Company. The same seeming frankness, but real reticence runs through the entire case. For instance, instead of a reference to hear and determine, a reference to take proofs and report would have been fairer, and would have answered every purpose. Indeed, the latter would have been the proper reference, for there was no real issue left in the case. By the course adopted the referee was not bound to, and did not, append to his report either the plaintiffs' account or the testimony taken before him; and thus the shareholders were deprived of any other record evidence of the accounting than the general findings of the referee.

Without referring to other matters of record, it is quite evident that, so far as the defendants, who appeared by the plaintiffs' attorneys, are concerned, the judgment ought not to be permitted to stand.

It is claimed that the applicants have been guilty of laches; but they were not put upon notice of the facts on which they now move merely by being advised of the decree and the receipt of a dividend thereunder. There has been no such laches, since the discovery of the facts now presented, as to

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justify a finding of acquiescence — and that is the test. The latter remark is, however, subject to qualification. Certain of the defendants, who now move had previously made a similar motion upon the same state of facts, which motion was withdrawn subsequently, and before making the present motion, these defendants accepted a further dividend under the decree herein. The fact of the payment of such dividend to all the shareholders is sworn to, and it is not denied or explained by these particular defendants. They accepted such dividend, therefore, with full knowledge of all the facts now presented, and for aught that appears (and the burden was with them), without protest or remark. They must, therefore, be held to have acquiesced in the decree.

With respect to these defendants, the motion must be denied. As to all the others, it must be granted.

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SUPREME COURT.

IN THE MATTER OF THE APPLICATION OF HENRY JAMES ANDERSON TO VACATE AN ASSESSMENT FOR PAVING FIRST AVENUE.

In order to obtain a vacation of an assessment for non-conformity with the law requiring publication of resolution or ordinance of the common council in certain newspapers, it must be shown that a certain paper in which the publication was not made was not only designated by competent authority, but that the paper so designated accepted such designation.

First Department, General Term, October, 1874.

APPEAL by the Mayor, &c., of the city of New York, from an order made at special term, vacating certain assessments made upon the property of the petitioner.

William Barnes, for appellant.

E. E. Uery Anderson, for respondent.

DANIELS, J. — The assessment forming the subject of complaint was laid in 1874, for the expenses of paving First avenue, in the city of New York, from Thirty-sixth street, northerly, to Sixty-first street. The avenue had been previously paved from Thirty-fourth to Thirty-seventh street, and the petitioner's property assessed for the expenses of that improvement, and that assessment had been paid by him. For that reason, he claimed that the assessment made in 1874 was for a repavement, and that it should be so far vacated as it affected his property, because the resolution directing the

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work to be done had not been published, as the law required it should be, for the period of two days previous to its adoption.

The resolution was presented to the board of aldermen of the city, on the 3d of December, 1868, and adopted by that board on the fifth, and presented to the board of councilmen on the seventh, and adopted on the tenth of that month; and the mayor approved it on the twelfth. This resolution, in order to render it valid, was required to be published at least two days before it was finally passed or adopted, in all the newspapers employed by the corporation of the city of New York. The publication was in the nature of a condition, the performance of which was essential to the legal validity of the resolution. Until that was made, it could not be properly passed or adopted (*Laws of 1857, 875, sec. 7*).

It is not claimed in this case that the resolution providing for the pavement of the avenue was not published, for two days before it was adopted, in any of the papers employed by the corporation, but that its publication was omitted in one of them. This objection is special in its nature; and, from the manner in which it has been presented, it amounts to a virtual concession that in all the other papers it was regularly published; and that limits the examination required in the case to the simple disposition of that objection. If that shall not be found to be well taken, the petitioner's application must necessarily fail.

Before the year 1863 the employment of newspapers by the corporation was regulated by one of the ordinances of the city, but since that year it has been made the subject of express legislative enactment, and each of the acts of the years 1863, 1865, 1866, 1867 and 1868 required new designations to be made in compliance with their terms, in order to justify the city in compensating their proprietors for their services, and under these provisions it was shown that the designation of 1867 was, in express terms, limited to that year. That circumstance, as well as the explicit provision made upon the

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subject in 1868, required a new designation and employment in that year (*Vol. 2, Laws of 1868, 2008*).

To supply that emergency, the acting mayor and the comptroller, to whom the duty and power of selection were confided, designated certain newspapers in which, according to the terms of the act of 1868, the proceedings of the common council, or either branch thereof, and the notices of its committees, should be published. This was done on the first day of December of that year, and but nine days before the resolution for the paving of First avenue was adopted by the board of councilmen.

It is claimed that the designation or selection of newspapers, for the special purposes mentioned, did not require the resolution adopted for making this improvement to be published in them, even though their proprietors accepted the employment thereby tendered them. But that position cannot be sustained, because the act of 1857, by force of its own provision on the subject, positively required the publication of the resolution on the mere circumstance of such employment. The obligation to publish the resolution in all the papers employed was distinctly created by that act, even though its performance was not provided for in the express terms of the employment. It was certainly within the substance of the employment, as long as it was a portion of the proceedings of the board of aldermen and councilmen. That included its publication, and when published, the act of 1857 required it to be continued for the period of two days at least.

But a mere selection or designation of newspapers, by the mayor and comptroller, did not, of itself, constitute an employment, and it was only in newspapers employed by the corporation that the act of 1857 required the resolution to be published. To constitute the employment contemplated, required something beyond a mere selection or designation by one of the parties to it. Some act, assent or acquiescence on the part of the proprietors of the newspapers selected, accepting the tendered service, was necessary for that purpose. Employ-

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ment is the result of a contract, expressed or implied, for the performance of services by the person or persons employed; and, like all other contracts, it requires the concurring assent of both parties to create the obligation contemplated by the terms. A mere selection or designation of one person by another to perform services for the latter, is no employment. It is simply an offer of employment, which may be withdrawn at any time before it has been accepted. In the present case, until the proprietors of the newspapers acquiesced in their selection by the mayor and comptroller, there was nothing to prevent them from being changed, and a new selection being made in its place, by those officers.

The proceeding for paving First avenue is assailed as invalid, because the resolution directing it was not published in the *Leader*, which was one of the newspapers mentioned in the selection made by the mayor and comptroller; but the proof made was not sufficient to maintain the objection, because it was not shown that the proprietors of that paper had any information whatever of the fact of its selection, or that it had in any form become public, before the resolution was finally adopted by the board of councilmen. Nothing, therefore, appeared from which an acceptance of the employment indicated could, with any reason, be inferred. Indeed, such an inference would be altogether unsupported and unwarranted.

It did appear that the resolution was published for one day in the *Leader*, on the 12th of December, 1868, but at most that is evidence of an acceptance of the employment only from that time, and then the resolution was actually approved by the mayor. This circumstance in no way justified the conclusion that the employment had been in any form assented to before that time; and as it was not, the publication of the resolution in that journal was not required by the direction given in the act of 1857. What that law provided was, that it should be published in the newspapers employed by the corporation before the time of its final adoption, but the *Leader* was not shown to have been then actually employed. See

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further upon this subject the opinions of DAVIS, P. J., in the cases of *Phillips* agt. *Burke*, decided during the present term. The decisions made in the cases of *Douglass* (46 *N. Y.*, 42), and *Astor* (50 *N. Y.*, 363), do not conflict with these views. Those controversies arose when the employment of the newspapers omitting the requisite publication was beyond controversy.

In the last of these cases, the objection was taken that the designation under the act of 1868 was not such an employment as the act of 1857 contemplated for the purpose of rendering the publication of the resolution necessary; but that was held untenable, and it well might be, for the designation, when acquiesced in or accepted, was sufficient to create an employment by the corporation, and the obligation to publish under the act of 1857 depended solely on the mere fact of employment. The resolution, in that instance, was adopted in September 1869, long after the acceptance by the Leader, of the designation made in 1868, actually took place.

Besides the reasons already given for a reversal of the order, the further circumstances appeared from the proofs made on behalf of the applicant that no pavement was previously made on First avenue beyond Thirty-seventh street for which his property had been assessed. That appeared to have been an original pavement, first made under this resolution; and as he was assessed and paid before only for paving the avenue to Thirty-seventh street, he should now be required to pay that part of the expenses which has been assessed upon his property for the pavement made upon the avenue beyond the point to which it was previously made; and that would appear to comprehend the assessment on the lots owned by him between Thirty-seventh and Thirty-eighth streets, including those upon the diagram from Nos. 4,516 to 4,525, both inclusive. They are all above Thirty-seventh street, and were probably assessed for the benefits deemed to be made to them by the pavement; and, for that, they were liable to assessment because that was not a repavement. As to that

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portion of the assessment made, the Laws of 1872 and 1874 rendered the resolution valid, even though it was not published in the newspapers employed by the corporation at the time when it was adopted (*Vol. 2, Laws of 1872, sec. 7; Laws of 1874, 364, sec. 7*).

The order appealed from should be reversed, with ten dollars costs, besides the disbursements on the appeal, and an order entered denying the application, with ten dollars costs.

In the Matter of Public Parks.

SUPREME COURT.

**IN THE MATTER OF THE APPLICATION OF THE DEPARTMENT OF
PUBLIC PARKS TO ACQUIRE TITLE TO CERTAIN LANDS FOR A
MILITARY PARADE GROUND.**

When the law transfers to another body the performance of certain duties, it conveys all the powers possessed by the former body, not expressly repealed.

A discretionary power to discontinue a proceeding instituted to acquire title to certain lands having been possessed by the mayor, aldermen and commonalty of the city of New York, provided the same be exercised before the confirmation of the report of the commissioners of estimate and assessment, is possessed by their successors, the commissioners of public parks.

General Term, First Department, October 30, 1874.

APPEAL from order denying motion made to require the commissioners of estimate and assessment to show cause why they should not forthwith make their report and complete their proceedings in this matter.

William R. Martin, for appellants.

George P. Andrews, for respondent.

DANIELS, J. — By chapter 628 of the Laws of 1871 power was conferred upon the officers comprising the board of the department of public parks of the city of New York, and the major-general commanding the first division of the national guard of the state, to lay out and establish, above Fifty-ninth street, a public square or place of such width, extent and direction as to them should seem most conducive to the public good, for the use of the first division of the national guard of the state for military encampments, parades, drills, reviews or other military evolutions or exercises. The officers men-

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tioned were required to cause a map, plan or survey, to be made, showing the location and extent of such square or place, which was to be certified by them and filed, and from that time the land selected was to become one of the public squares or places of the city of New York. The evidence presented to the court in support of the application made in this proceeding showed a compliance with these provisions of this statute.

This act did not prescribe the mode by which the title to the square or place should be acquired after the certifying and filing of the map. That was to be done by means of proceedings taken similar to those prescribed by section 6 of chapter 697, of the Laws of 1867; volume 2, Laws of 1871, 1872, section 2. That section required an application to be made to this court for the appointment of commissioners of estimate and assessment, within two years from the time of the filing of the map; and the proceedings taken for that purpose were required to be in conformity to the laws at that time in force for opening public squares, streets, avenues and roads in the city of New York (*Vol. 2, Laws of 1867, 1872, sec. 6*).

And by section 11 of chapter 200 of the Laws of 1871, the power to institute and carry them on was given to the commissioners of the department of public parks, when the land to be taken was situated north of Fifty-ninth street, as the land described in the map filed concededly was. By virtue of this authority an application was successfully made by such officers for the appointment of commissioners of estimate and assessment, and they entered upon the discharge of their duties pursuant to such appointment; but before any report was made by them, a resolution was adopted by the commissioners of public parks, discontinuing the proceedings instituted to acquire title to the land. This, it is now claimed on the part of the owners of the land included within the survey and map made, they had no power to do.

As they were neither divested of their title or possession by the survey and filing of the map, and by the appointment of commissioners of estimate and assessment, it is not readily perceived how they could possibly be injured by the discon-

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tinuance of the proceedings taken to acquire their title; and, if they were not, then the order denying their motion affected no substantial right, and it was not appealable. But, as the decision of that point is not actually essential to the disposition of the case, it is unnecessary to give it any extended consideration.

By the laws then in force prescribing and regulating the proceedings to be taken by the mayor, aldermen and commonalty of the city for the acquisition of title to lands required for streets, roads, avenues and public squares in the city, the power to discontinue them, at any time previous to the confirmation of the report of the commissioners of estimate and assessment, was expressly given them; and they were allowed to do that without the leave of the court in which the proceedings should be pending (*Laws of 1839, 185, sec. 7*). As to their power in that respect, no ground for doubt or controversy existed. And, by the act providing for the making of a parade ground, it was, in effect, provided that similar proceedings should be taken, in all respects, for acquiring title to the necessary lands as the mayor, aldermen and commonalty had the right to institute to acquire title to streets, avenues, roads and squares, when the proceedings were carried on by them (*Chap. 628, Laws of 1871, sec. 2; chap. 697, Laws of 1867, sec. 6*).

Under these provisions, and that made by section 11 of chapter 290 of the Laws of 1871, the commissioners of the department of public parks were required to take the proceeding for the acquisition of the title in the name, and on behalf of the mayor, aldermen and commonalty of the city; and such proceedings were to be similar, in all respects, to those prescribed for the mayor, &c., when taken by them. The language of the last provision referred to upon this subject is particularly clear and explicit. It is, "that in and about the proceedings the board of commissioners shall have and possess all the powers, and perform all the duties, then by law conferred on and authorized to be performed by the mayor," &c. (*Vol. 1, Laws of 1871, 571, sec. 11*).

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One of those powers was the right to discontinue the proceedings before the confirmation of the report of the commissioners of estimate and assessment. It was obviously provided for the purpose of relieving the city from proceedings of this nature, and the burdens in the end imposed by them, when they appeared to be unnecessarily or improvidently taken, and it was as proper for that purpose when the proceedings were taken by the commissioners of public parks as when they might be taken by the mayor, &c., of the city. The end and object to be attained were substantially the same in each instance, and the proceedings instituted to attain them were required to be similar in all respects. No change whatever was made in the mode of proceeding, but it was allowed to be instituted and carried on by the commissioners of the department of public parks, instead of the mayor, &c., of the city. The power and process for acquiring title remained the same, but it was to be instituted and carried on by different officers.

There is no foundation for the position that the power to discontinue was not vested in the commissioners. It was not necessary that it should have been in express terms given to them; for it was incidental to the proceedings they were expressly allowed to take and carry on, and as such, it inhered in and passed with the proceedings themselves to the commissioners of public parks. No new power was given to them, but simply that which, but for the transfer, the mayor, &c., would have been required to exercise. The commissioners had all the preceding authority over the subject, no more and no less; and as one of its qualifications, they possessed the power to discontinue the proceedings at any time before the confirmation of the report of the commissioners of estimate and assessment. That, in the exercise of their discretion, they have done, and for that reason the motion was properly denied, and the order appealed from should be affirmed, with ten dollars costs besides disbursements.

DAVIS, P. J., and BARRETT, J., concurred.

In the Matter of Rollwagen.

SURROGATE'S COURT—COUNTY OF NEW YORK.

IN THE MATTER OF THE PROBATE OF THE LAST WILL, &C.,
OF FREDERICK ROLLWAGEN, deceased.

Will and codicil denied probate on the ground of want of due execution, testamentary incapacity of decedent, and undue influence exercised over him.

Frederick Rollwagen, the testator, died in the city of New York on the 11th of October, 1873, at the age of sixty-six years, leaving, as next of kin and heirs at law, three adult sons, seven grandchildren, the family of a deceased daughter; also left a widow (his third wife), who had a child born about one month after his death. The other heirs were children by the first marriage. He also left, at the time of his death, real and personal property worth about \$800,000, mostly in real estate. The application for the probate of the will, which was dated the 17th of June, 1873, and the codicil, which was dated on the 5th of September, 1873, was made and supported by the widow, named as executrix, and her two brothers, Henry and George Herrmann, named as two of the executors. Frederick Rollwagen, Jr., the testator's eldest son, was also named as one of the executors, but did not join in the application for probate, but joined with his brothers in contesting both the will and codicil.

The will and codicil gave to the widow a much larger proportion of the estate than would have been her share had the decedent died intestate.

In this proceeding the surrogate examined sixty-eight witnesses, whose testimony covered over 1800 printed pages, and, as a final result, came to the conclusion:

- 1st. That the requirements of the statute had not been observed in the execution of the papers offered for probate;
- 2d. That the decedent, at the time of the alleged execution, was not possessed of *testamentary capacity*; and
- 3d. That the execution was the result of *undue influence, fraud and circumvention* exercised over the mind of the decedent by his wife and her brother Henry Herrmann.

Henry L. Clinton, George F. Langbein, Malcolm Campbell & David R. Jacques, for contestants.

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William Henry Arnoux, and Ritch & Woodford, for respondents.

ROBERT C. HUTCHINGS, *Surrogate*. — The decedent was, at the time of his death, of the age of sixty-six years. He was a native of Alsace, one of the German Provinces of France, and was, as his name would indicate, of German lineage and language. He came to America in the year 1829. He died on the 11th of October, 1873, leaving, as next of kin and heirs at law, three adult sons, all married, the eldest of whom is forty years of age, and seven grandchildren, the family of a deceased daughter, Mrs. Sarah Browning. The three sons and the mother of the seven grandchildren were children born of his first marriage. About the year 1866, he contracted a second marriage, of which there was no issue, the wife only surviving her marriage about a year. On the 19th day of September, 1871, he was married for a third time, to Magdalena Herrmann, who survives him as widow.

The decedent was by occupation a butcher, and by strict attention to business, thrifty and economical habits, and judicious investments in real estate, he had accumulated real and personal property worth, at the time of his death, about \$800,000, much the larger portion of which is in real estate.

The two papers propounded for probate, respectively, as the will and codicil of the decedent, and which are the subject of controversy, were executed, according to the claim of the proponents, the will on the 17th day of June, 1873, and the codicil on the fifth day of September of the same year.

By the provisions of the first paper, the widow is given, absolutely, the house occupied by the decedent at the time of his death, known as No. 312 East Ninth street, with all the personal property therein, for her own use, also one-third of all other personal property, absolutely, besides one-third of the rents and income of all his other real estate for life. The remaining personal property is to be divided in four equal shares, one share to belong to each of the sons, and the

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remaining share to be invested for the children of his deceased daughter, Sarah Browning, to be paid over to said children when they shall respectively attain the age of twenty-one years. . It directs the remaining part of the rents of his real estate to be divided into four equal shares, one-fourth to be given each of his sons, and the remaining fourth to be invested for the benefit of the children of Mrs. Browning. It further directs that none of his real estate shall be sold, or disposed of, or divided, during the lifetime of his wife; nor after her death, until the youngest of his grandchildren, then living, shall have attained the age of twenty-one years. It provides that his children shall only have the income of his real estate during their natural lives, and that the fee thereof shall become vested in their issue then surviving, and the surviving issue of his deceased daughter, Mrs. Browning, when the youngest of his grandchildren then living shall have attained the age of twenty-one years. It provides that Henry Herrmann, the brother of the widow, shall let and rent all his real estate, and collect and receive all the rents, and shall receive three per cent commission on the gross amount collected; and it appoints his wife, Magdalena, executrix, and her brothers, Henry Herrmann and George Herrmann, and Frederick Rollwagen, Jr., executors of the will.

The witnesses to the alleged will are Joseph Bellesheim, of West Mount Vernon; Dr. Henri Goulden, of No. 22 East Twenty-second street; and John Theisz, of No. 331 East Ninth street.

The paper propounded as a codicil recites that, whereas, by his will, the decedent has given to his wife the house No. 312 East Ninth street, with the personal property therein mentioned; and further, that in order to better her condition, he devises to her, in addition, four houses and lots, known as Nos. 165, 167, 169, 171 Avenue A; and further, that, by his will, he had made no provision for any child or children who might be born afterward by his wife; he therefore gives,

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devises and bequeaths, to each of such thereafter born children, an equal share of his estate, real and personal, in the same manner as bequeathed to his children named in his will; and that all of his children born and to be born shall each take an equal portion, or share, of his remaining real and personal estate, instead of one-fourth part, as stated in his will; and he confirms and ratifies his former will in all particulars other than those changed by the codicil.

The same persons were the subscribing witnesses to the codicil as to the will.

All of the children of the decedent who are of adult age, the youngest being twenty-two and the eldest forty, and his grandchildren, the children of Mrs. Browning contest the validity of the papers propounded, the latter through their special guardian. The supporters of the validity of the papers are the widow of the decedent, Magdalena Rollwagen, named also as executrix of the will, and her brothers, Henry and George Herrmann, named therein as two of the executors. Frederick Rollwagen, Jr., the eldest son of the decedent, and who is also appointed an executor, did not join in the petition for probate.

The contestants filed objections to the admission of the papers to probate, in substance, as follows:

1. That the papers were not the will and codicil of the decedent.

2. That the decedent did not sign the papers, or either of them.

3. That he did not sign them in the presence of each or either of the attesting witnesses.

4. That he did not acknowledge the subscription to the papers, or either of them, to each or any of the subscribing witnesses.

5. That if he did so subscribe them, or either of them, or at the time of the acknowledgment thereof, if he so acknowledged them, he did not declare them to be his last will or a codicil thereto respectively.

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6. That the attesting witnesses did not, or either of them, sign, as such, at the request of the decedent.

7. That the decedent was not, at the time the papers purport to have been executed, possessed of testamentary capacity.

8. That the execution of the papers, if executed by the decedent, was obtained by fraud, circumvention and undue influence, practised upon the decedent by Magdalena Herrmann, otherwise called Magdalena Rollwagen, claiming to be widow of the decedent; Henry Herrmann, George Herrmann, and their mother; and John Theisz, one of the subscribing witnesses thereto.

9. That the papers were not freely and voluntarily executed by the decedent, but that the subscription to each of them and the publication thereof, if subscribed and published by him, were procured by fraud, restraint and coercion exercised upon him by the same parties.

10. That each of the papers is invalid in law, illegal and void in each and every provision thereof.

A posthumous daughter, born of the widow, also appears by her special guardian as a contestant, upon substantially the same grounds as those above stated.

In all sixty-eight witnesses were examined in the proceeding, and their testimony is very voluminous, covering over 1800 printed pages.

I shall only consider, in this opinion, the salient features of the case, as I view them and as they appear from the testimony; much of which, in this, as in nearly all cases of contests on the probate of wills, I find upon examination, to be immaterial, and not germane to the real issues in the case.

The relations of the parties to a proceeding are always important in considering the questions that arise in contests in this court, and often have a direct bearing upon the issues pending.

The maiden name of the widow, Magdalena Rollwagen, was Herrmann. She was a niece of the first wife of the

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decedent, and was commonly known and addressed in the family by the appellation of "Lena." She is a woman of between forty and forty-five years of age. Twenty-one years since, on her first arrival in this country, she was employed as a domestic in the family of the decedent and his wife, her aunt, for a brief period; and, so far as appears by the testimony, it was not until 1869, that she again became a member of his household, being then employed in the position of housekeeper and attendant upon the decedent, after his health had become seriously impaired, at a salary of fourteen dollars a month. At the time of her last employment, the decedent was living in the dwelling which has been designated as the "old house," No. 334 East Ninth street.

Henry Herrmann, her brother, named in the will as an executor, up to the time of the marriage of the decedent with his sister, had no intimacy with him other than that which would grow out of relationship by the marriage of his aunt, the first wife; and even in view of that relationship, their interviews were only casual and very infrequent. Herrmann was latterly engaged in a small business as a grocer on Houston street, but after his sister's marriage, he removed his business to Avenue A, occupying a store in one of the decedent's houses, and continued in such business until the month of June, 1873, when he became the agent of the decedent's estate under a claim of employment by him for collecting rents and caring for his property. Some months previously thereto, at the time the youngest son of the decedent, George, left for California, he had been intrusted with keeping his books of account.

So far as the relations existing between the decedent and his children are concerned, the testimony fails to show that there was any but the most kind parental feeling on his part toward them, and filial devotion manifested on their part toward him. I do not consider the family differences appearing in this case such as to justify the assumption, by the proponents, of the existence of hostile feelings on the

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part of the decedent toward any of his children or grandchildren; but to have been, rather, such differences only as were slight, temporary in duration, and liable to occur in households, and which it would be unjust and unreasonable to regard as evidence of diminished affection or permanent discord, and it seems to me that only perverted interest or malevolence could so construe them.

The paper propounded as the will certainly appears to be inequitable in its provisions, when the number and relations of his immediate kindred and all the circumstances of the case are considered; as by the will there is given to the widow a larger proportion of the estate than would have been her share had the decedent died intestate. The paper propounded as a codicil largely increases the provisions for her benefit, in that it gives to her, still further, the four houses and lots on Avenue A. The will also practically deprives, to a great degree, the eldest son, Frederick Rollwagen, Jr., who is named as executor; of any powers in such capacity, in that it vests, and the codicil continues, the supervision and management of the estate in Henry Herrmann, as to letting and collecting rents of real estate, until the youngest grandchild of the decedent becomes of age. Except that Frederick has co-ordinate power to pay debts, the authority of Henry Herrmann practically excludes him from a large part of the management of the estate for fourteen years, the youngest grandchild being at the present time only seven years of age.

The issues which are properly before me for my determination, upon the evidence which has been presented in the case, are, in substance:

1. Were the requirements of the statute observed in the execution of the papers offered for probate?
2. Was the decedent, at the time of the alleged execution, possessed of testamentary capacity?
3. Was the execution the result of undue influence, fraud or circumvention, exercised over the mind of the decedent by his wife and her brother Henry Herrmann, or either?

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The physical condition of the decedent is very important to be considered, in endeavoring to arrive at a proper conclusion upon the issues involved. It is not disputed by the proponents that he was ill and very feeble for a long period previous to his death. Even Dr. Goulden, the physician who attended him, and who was one of the subscribing witnesses to the will and codicil, admitted that he was an invalid during the last year of his life. He was a man who had been, during his life, addicted to the excessive use of stimulating drinks, and it appears from the testimony that, at times, he drank to great excess. His malady, up to the year 1869, so far as the testimony discloses it, was rheumatism. For some years previous to that period, he was obliged to use a cane in walking, although naturally a man of great physical strength. In the year 1870, the proofs show that he was afflicted with a difficulty of speech, which was the occasion of remark by those who knew him, and this difficulty continued to increase.

During the years 1871 and 1872, and up to the day of the decedent's death, I am satisfied he was suffering from paralysis, which rendered it exceedingly difficult for him to move without assistance, and that it was the paralysis which affected his speech, and finally rendered it impossible for him to articulate words intelligibly to others. He undoubtedly became more and more feeble during the last year of his life. The evidence shows that he was unable to dress himself, to attend to his most ordinary wants, or even to control the calls of nature, and that he was in a condition of hopeless physical dependence upon those around him.

Although the results of the disease from which the decedent was suffering may have been manifest to a large number of lay witnesses, who have been examined in this case, yet its character must be decided upon the testimony of the professional witnesses.

Dr. Henri Goulden, who had been the attending physician of Mrs. Rollwagen, before and after her marriage, and who was called in professionally to attend upon the decedent, tes-

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tified that he visited him in the year 1871 twelve or fourteen times, and that he was then suffering from rheumatic neuralgia — sciatica — and that he did not have paralysis. He also treated him for tapeworm and for colds. He ceased his visits in September, 1873, subsequent to the execution of the codicil, on account of his own illness, and by reason of which the other professional witness, Dr. Marcus C. Tully, was called in.

In respect to the illness of the decedent, and his possible condition during the time that he professionally attended him, Dr. Goulden conceded that he was in an exceedingly helpless state, and had been so for many months previous to the execution of the papers propounded, and that he experienced great difficulty of speech.

The testimony of Dr. Tully, a witness who was called on the part of the contestants, is, to my mind, controlling in the conclusion that the malady of the decedent was not merely sciatica, but that, during all of the year 1873, he was afflicted with paralysis in the form of hemiplegia. Dr. Tully's statements were very frank and clear, and to all appearances disinterested. He was called to attend the decedent during the last of September, 1873, by reason of the serious illness of Dr. Goulden. He testified that he continued his visits until the eleventh day of October, when the decedent died, and that, in his judgment, the cause of death was paralysis; that it was one of the slow forms of that disease; and, from all the indications, the decedent had been afflicted with it for two or three years; and that he was informed by the decedent's wife, in reply to a question he addressed to her, that the first attack had occurred some three years before. Dr. Tully enumerated the manifestations of the disease. From an examination, he was satisfied that it was in an advanced stage, and that there was little hope of recovery. When he first went to see him, decedent was sitting up in a chair, and seemed to be unable to help himself to anything. During all the time Dr. Tully attended him, up to the day of his death, he states that the decedent did not speak or pronounce a word or syllable that

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he could understand; that he could not articulate, and that if he had possessed the strength, by reason of the paralysis of his tongue, he could not have spoken; and when he asked the decedent in reference to his symptoms, Mrs. Rollwagen told him what she asserted the decedent had said. On his cross-examination, Dr. Tully testified that he believed the hemiplegia from which the decedent suffered was on the right side; that a genuine case of that disease affects one side of the body down through from the brain. The symptoms which indicated to him the duration of the disease were stupor, showing an increase of serous effusion of the brain, and dropsy in the extremities, and debility; that stupor is considered one of the symptoms, and is an indication of pressure upon the brain, which produces hemiplegia; that when he first saw the decedent he was feeble, weak and dropsical about the extremities, and in a stupor, and that he had to speak to him two or three times to arouse him; that the decedent attempted to make answer to his question, something which he could not understand, but it was a guttural sound, and that his tongue was paralyzed. He further stated that the decedent's wife was always present when he made these sounds, and always told him what she claimed the decedent meant. From what he saw of the decedent, he thinks he was hardly able to walk in the months of August or September, without a great deal of assistance; but that he might, by helping, drag his feet along.

The testimony of these two witnesses, therefore, disagree in this respect; that, whereas Dr. Tully testified that the decedent was afflicted with paralysis, in the form of hemiplegia, Dr. Goulden did not recognize in him the existence of any such disease, but treated him only for sciatica, tapeworm and some minor ailments. Both agree as to the affection of the throat. Dr. Goulden admitted that the decedent had great difficulty in speech, and Dr. Tully testified that the difficulty was the result of paralysis.

Having thus presented my conclusion as to the nature of

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the disease with which the decedent was afflicted, I will now proceed to consider whether, from his physical condition before and at the time of the execution of the papers propounded as his will and codicil, and from his incapacity to speak, it was possible for him to give certain expression to his wishes in respect to testamentary dispositions of his property, so that they might be embodied in a written instrument; and if there existed, on his part, any means of communication by which the subscribing witnesses could judge with a fair degree of certainty, whether the decedent comprehended the meaning of the provisions of the two instruments, and was satisfied with them.

There is no dispute that the decedent was an illiterate man, in so far that he could not read, except figures, and could not write more than his name. Hence, all the instructions as to the preparation of the papers, and the declarations at the time of the alleged execution of the same being his will and codicil, and the requests to the subscribing witnesses to sign as such, if such declarations and requests were made, must have come from him either orally or, in the absence of express language on his part, must have been made by some method known to those who were present on the three occasions.

It is first important to consider, in this connection, whether these papers propounded for probate were prepared by the draftsman in accordance with any instructions of the decedent. The testimony of Mr. Bellesheim is, that Henry Herrmann, a few days before the alleged execution of the will, came to his office and told him that the decedent wished to see him. He did not go at once, in response to the request, and Herrmann made another call upon him and asked him why he had not come, as the decedent expected him. The following day he went, in the morning, and found Mrs. Rollwagen present. The decedent was sitting in an arm-chair, and was very feeble, and could not move. Mr. Bellesheim asked what was wanted of him, but the decedent made no reply. Then, after Mrs. Rollwagen addressed the decedent, and inquired what he

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wanted of Mr. Bellesheim, he made an obscure sound, unintelligible to Bellesheim, upon which Mrs. Rollwagen went into the adjoining room, brought forth an envelope containing a paper, which proved to be a will previously executed by the decedent, and known in this proceeding as the "Rosenstein will," and she stated that the decedent desired to have a new will made, in which the new house just purchased should be devised to her instead of the old house, which had just been sold, and which had been given to her in the Rosenstein will; also that the name of Henry Herrmann should be substituted as executor in the place of Mr. Beers, who had been named in the Rosenstein will; and that, in other respects, the dispositions under the Rosenstein will should be incorporated in the new instrument. Mr. Bellesheim repeated to the decedent the instructions which Mrs. Rollwagen had given, to know if they were his desires, and, in response, the decedent made the same obscure nasal sound, from which he inferred that the directions she had given him were correct.

Then, as to the preparation of the codicil, it appears by the testimony of Mr. Bellesheim that Henry Herrmann again called upon him, some time before its alleged execution, with a similar statement, that Mr. Rollwagen desired to see him. The matter escaping Mr. Bellesheim's memory, Herrmann came again and repeated the request, and Mr. Bellesheim went accordingly to the decedent's house, and was taken into his presence. After waiting for some time, with a confessed inability to communicate with him at all, and a statement made by him to Mrs. Rollwagen's mother, in the presence of the decedent, that he could not understand him, Mrs. Rollwagen came into the room and stated to Bellesheim that the decedent desired to make an alteration in his will; that he wanted her to get four houses in Avenue A, and in case she should get a child by him, the estate should go in even shares or equal shares with the other children. She subsequently gave Mr. Bellesheim the numbers of the houses referred to, and he took the precaution to show the memorandum thereof in writing to the decedent,

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who did not say anything, and could not say anything, but he nodded the same as before.

It thus appears that, so far as the preparation of the will and codicil is concerned, there was no expression, either by words or sounds, proceeding originally from the decedent, by which his wishes were stated in regard thereto; and if any directions were given by the decedent at all, they are only to be inferred from the representations made by his wife, and from his assumed assent thereto. It is not claimed that he assented by the use of any spoken word or words, but only by the obscure sound already referred to, and by a nod of the head. Nor is there satisfactory evidence of any manifestations by the decedent that his mind was in a condition to comprehend the scope and bearing of the directions, if given at all.

The testimony of Mr. Bellesheim (who, it is fair to infer from all the circumstances in the case, was retained by Mrs. Rollwagen and Henry Herrmann, her brother) is, therefore, conclusive to my mind as to the fact that the decedent had no power of expressing his wishes in vocal or articulate language at the time the directions were given for the preparation of the will; and, in this respect, his testimony as to the physical condition of the decedent is confirmatory of that of Dr. Tully, who testified that the same condition must have existed for a long time before he was called to attend upon him in his capacity as physician. That these supposed instructions were entirely satisfactory to Mrs. Rollwagen, there cannot be any question. Whether they were satisfactory to the decedent is a question of the gravest doubt, even admitting that he had the mental capacity to comprehend them—for the reason that he had no power of utterance, and no means of communicating his wishes, proceeding originally from himself. Mr. Bellesheim inferred that they were satisfactory to the deceased because he seemed to acquiesce in them.

Dr. Goulden, another subscribing witness, admits that, prior to the execution of either paper, no request was ever

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made to him by the decedent, directly, that he should become a witness thereto. All the requests came directly from Mrs. Rollwagen.

In respect to the execution of the papers propounded, does the testimony of the subscribing witnesses show that any form of expression was used by the decedent to indicate that he comprehended their nature or import?

It appears from the statements of Mr. Bellesheim that all the forms prescribed by the statute for the due execution of testamentary instruments were complied with at the time of the alleged execution of both papers, so far as the *recitation* of them by Bellesheim was concerned. But his testimony is direct to the point that no word or words were uttered by the decedent, from which more than an inference may be drawn, that he understood the nature of the proceeding that was going on. On the contrary, in each case, questions were asked at each successive step, by Mr. Bellesheim, in their proper order, and the decedent made the same obscure nasal sound, previously referred to, from which, Mr. Bellesheim states, he inferred the assent of the decedent to the alleged execution.

Nor, do I find in the testimony of Dr. Goulden any evidence that there was any declaration on the part of the decedent as to the paper being his last will and testament, though I have examined his testimony most carefully, both on his direct and cross-examinations.

And in respect to the execution of the codicil, the testimony of both witnesses is entirely unsatisfactory as to any declaration or request on the part of the decedent; and, if made at all, they are simply to be inferred from language addressed to the decedent, and from nods, and the utterance of obscure sounds, claimed to be in response.

The testimony of Theisz, the third subscribing witness, differs from that of the other two, in the fact that it proves too much as to the capacity of the decedent to converse audibly, or too little on the part of Bellesheim and Goulden to under-

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stand him. Each of these three witnesses was examined when his associates were, by direction of the court, excluded from the court room. The contradiction between Bellesheim and Goulden, on the one side, and Theisz on the other, can only be reconciled, if at all, by the fact, as claimed by the proponents, that the two were not as near the decedent as was Theisz, and, therefore, they were not as good judges of the capacity of his speech. But I am convinced, in view of all the evidence in reference to the execution, that the claim that Theisz had any advantage of position over the other witnesses has no sufficient foundation. Dr. Goulden was not by any means a hostile witness, but, on the contrary, by reason of his being a compatriot of Mrs. Rollwagen and her brothers, and her physician, was most friendly to them; and his testimony directly contradicts that of Theisz. In addition to that, so far as hearing the articulate whispered utterances of the decedent is concerned—if such utterances were made, as testified to by Theisz—Mr. Rollwagen also being a native of Alsace, Dr. Goulden would be more apt to fully understand the *patois* of the decedent, which, Bellesheim, as well as Theisz himself, states, was used by him in speaking the German language. But Dr. Goulden failed to hear anything but the obscure sounds already described. If Theisz's testimony is to be believed, then, not only was the decedent possessed of full testamentary capacity, but was possessed of very good powers of speech, for an invalid who had been suffering for a long period from paralysis.

I have thus considered the testimony of the professional witnesses who have been examined in the case, and also that of the subscribing witnesses to the will, in reference to the ability of the decedent to express his ideas and wishes directly by speech.

But there were a large number of witnesses called by each party to the proceeding, for the purpose of proving the capacity or incapacity of the decedent to communicate his ideas through the medium of spoken language. Some were mechan-

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ics, employed on buildings he was altering or erecting ; some were visitors to his house ; some were friends and relatives of the Rollwagen family, and others friends and relatives of the Herrmanns. Though these statements of the witnesses called by the two parties, respectively, are more or less diverse and contradictory ; yet, from a careful examination of all the proofs bearing on this point, I am constrained to believe that the decedent, for many months previous to the execution of the papers propounded as the last will and codicil, did not have the power of communicating his thoughts by spoken words ; and that the weight of evidence sustains the opinion expressed by Dr. Tully, to wit : that the decedent had suffered from paralysis for a long time, and that his inability to speak was mainly the result of his paralyzed condition. If, at the best, their testimony leaves the question in doubt, as to his ability to express his ideas in speech before and after the execution of each of the instruments offered, I must be governed primarily by the undisputed evidence of Mr. Bellesheim, that he did not possess the power of speech at the time the alleged directions were given for the preparation of the will and codicil ; and also the great preponderance of proof of Mr. Bellesheim and Dr. Goulden, that, at the time of the execution of each instrument, he was under the same disability ; and certainly, each, in the desire to sustain the cause of the proponents, could not have failed to have discovered in the decedent the ability to express his wishes, as testified to by Theisz, if such power, in point of fact, existed.

There were four witnesses examined by the proponents, whose testimony proves a capacity of speech by the decedent even greater than was testified to by the attesting witness Theisz. I refer to Mrs. Henrietta Perry, her son Fred. C. Perry, Mrs. Amelia Schmoll and Mrs. Martha Miller. These witnesses represent a class by themselves. They are not like those who profess to have had business transactions with the decedent, but are the friends of Mrs. Rollwagen.

Many years before her marriage, and soon after her arrival

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in this country, Mrs. Rollwagen, then Magdalena Herrmann, was a domestic in the house of Mrs. Perry; and shortly before Magdalena's marriage to the decedent, Mrs. Perry called upon her at the old house in Ninth street. Mrs. Perry's testimony as to the decedent's capacity of speech was to the effect that, in 1873, he said to her that his son Frederick came there and wanted him to give him a power of attorney; that they wanted to make a fool of him; and that then, when he wanted money, he would have to ask them for it. She repeated various conversations which, she alleges, she had with the decedent, and stated, in general terms, that she had never any difficulty in understanding him.

I am constrained, in view of all the facts and circumstances proven, to regard the statements of Mrs. Perry as incorrect and unreliable when compared with the testimony of other witnesses for the proponents, to which I must give credence, especially that of Mr. Bellesheim and Dr. Goulden. They do not pretend that the decedent was able to utter more than an obscure inarticulate sound at the time of the execution of the will, which was in the month of June, the same month when, according to the testimony of Mrs. Perry, he uttered the long sentence above quoted.

Mrs. Martha Miller, who had for many years been employed in the family of the decedent to do washing and house cleaning, and who is at present in the employment of his widow, testified that in the month of June, 1873, the decedent told her that "he had fixed a boy," and also told her that "he wished to live so long as he could see the baby — a couple of years longer." She also testified to many declarations and remarks made by the decedent during the last two years; but on her cross-examination, she made statements which compel me utterly to discredit her testimony. She stated that she had never communicated to any person a knowledge of the facts which she could prove, and she reiterated the statement time after time; and yet it was evident that counsel could not

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have elicited those facts unless she had given the information of her knowledge in that regard.

Mrs. Amelia Schmoll, an old friend of Mrs. Rollwagen for ten years, testified that she saw the decedent as late as September 24, 1873, and that on that day she heard the decedent say to his son Frederick, "You write and tell George to stay." About the same time, she states that Frederick asked his father at dinner, what part of the chicken he would have, and the decedent said "breast;" that in August, 1873, which was the period between the execution of the will and codicil, the decedent said: "If Lena dies, what will I do? I will have to go to the hospital;" that she reminded him that he might go to his son's, and he replied, "I did twice, but never more." She further testified that on leaving one day, he said, "Lena, go get some wine;" and that he drank the same as any other man would, she supposes, using his right hand. In reference to the statements which Mrs. Schmoll makes of the words spoken by the decedent in the presence of Frederick Rollwagen the son, she was fully contradicted by Frederick, who states that he never, during the last year of his father's life, heard him utter anything which he could understand. And in passing I may observe that the striking uniformity with which a large number of the witnesses for the proponents testified to Mrs. Rollwagen's interpreting the inarticulate sounds spoken by the decedent as calls by him for wine, indicates, in my view, not so much the presence of intelligence and mind in the decedent, as that he was influenced by the force of a ruling passion and habit which his wife was only too willing to gratify. Mrs. Schmoll also testified that in September, 1873, the decedent said, in a clear tone, "I feel bad, and I think I am going to die;" and that she cheered him by talking of the little Rollwagen that was "coming to town," the prospective christening, and that she and the decedent, on that occasion, would dance in the parlor; and that the decedent then laughed "until the tears ran down his cheeks." She further stated that she could not recollect

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whether Mrs. Rollwagen did not tell her what she claims the decedent said, except on one occasion, when he used words in German, which she did not at once understand; and she also testified that she never had the slightest difficulty in understanding everything the decedent said.

In respect to the alleged conversation testified to by Mrs. Schmoll about the coming Rollwagen, the time is fixed to have been on the twenty-fourth of September—the day when Dr. Tully was called in as the attending physician; and he states that the decedent was at the time in a stupor, from which he had to arouse him, and he then was unable to elicit from him a single word or articulate sound, and further, if the decedent had the strength, by reason of paralysis of his tongue, he could not have articulated. To my mind, it is only necessary to refer to the clear and intelligent testimony of that gentleman to arrive at a proper estimate of the credit to be accorded to the remarkable statements of Mrs. Schmoll. There is, however, one salient feature of her testimony, which is confirmed by several of the witnesses on the part of the proponents, and which is, in substance, that the decedent frequently shed tears. This exhibition of emotion is often observed in persons suffering from paralysis.

A striking commentary upon the evidence of these three witnesses is furnished by Henry Herrmann, the proponent himself. He admits that he had a difficulty in understanding the decedent as early as the fall or summer of 1872; that after June, 1873, on some days, he could not understand him; he sometimes understood him; that Mrs. Rollwagen began to interpret in the fall or summer of 1872; that she generally interpreted about half of what the decedent said to him, and he had heard her interpret to others.

Samuel S. Browning, another grandson of the deceased, testified that, as early as May, 1872, Henry Herrmann told him that he did not like to go to Mr. Rollwagen's, because he could not understand anything he said, and that "he got very mad and kind of cried."

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Fred. C. Perry, a sophomore student in Dartmouth college, and a son of Mrs. Perry, testified that, in February, 1873, he called on the decedent with his mother, and that the decedent shook hands with him and said "How do you do?" that the decedent asked him about his college course, and what year of the college course he was in, and how he liked the place, and how many students were there, &c., &c. He testified, also, that he told the decedent what Latin books he was reading. The testimony of this witness does not come down to a later period than four months previous to the alleged execution of the will. I should judge that the classical references of the witness, addressed to an ignorant butcher, who could neither read English nor German, the only languages with which he was familiar, were about as intelligible to him as references would have been to propositions in the higher mathematics, or the abstractions of mental philosophy. It is characteristic of young collegians to imagine that they belong to a chosen, select and favored class, and I should judge from the testimony of young Perry, and from his appearance, that he was himself much more interested in the details of his college life than was the decedent, provided the latter had intelligence enough even to listen to what must have been, in his condition of life, at best, most obscure to his comprehension, and that probably the witness accorded to the nods and motions of the decedent a much greater understanding of his voluble narrative of collegiate experience than the decedent really manifested.

I deem it unnecessary to review further the testimony of those witnesses who represent the decedent, at or about the time of the execution of the codicil, as having uttered words which were intelligible to those present. Their testimony, taken most favorably, is a struggle to prove only the slightest articulation, and is, of itself, an implied admission that he was a speechless man, so far as any conversation could be had with him; a struggle to lay a foundation for the claim that he was not the utterly speechless and helpless old man that

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he is shown to have been by the testimony of two of the attesting witnesses to the will and codicil, and by that of a majority of the witnesses who had business transactions with him.

Being forced, irresistibly, to the conclusion that the incapacity of the decedent to communicate his wishes has been established by the evidence, and especially at the time the directions were given for the preparation of the will, and at the time of its execution; and that the party assuming to communicate between him and the attorney who prepared the instrument, was, in each case, the widow, who is to be so much benefited by its provisions, and her brother, who is himself made the agent and manager of the estate for many years to come under its provisions, I regard it as extremely dangerous, in a judicial determination, to accept the presumed assent by a nod, or the assumed communication of wishes by obscure, inarticulate sounds, known only, if at all, by the widow, who is so largely interested in the result. And of the correctness of this view I am the more convinced, when it is shown by some of the witnesses for the proponents, if they are to be credited, that the decedent, before and after the execution of both will and codicil, intelligibly spoke entire sentences; for, if this were so in fact, it is almost incredible, as it seems to me, that, on a day when it was found he was able to communicate his wishes directly, measures should not have been taken to have the scrivener present to receive the directions from the decedent's own lips, and that they should not have selected a similar occasion for the execution of the instruments, when the decedent could have published and declared them to be his will and codicil, and have requested the attesting witnesses to subscribe their names thereto, by his own words, and not by an implied assent given by a nod or an inarticulate sound.

It is doubtless true, that where a will is prepared and executed under circumstances which do not admit of a suspicion of fraud or undue influence; or where the relations of

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the parties are such as would make the proposed disposition evidently equitable and natural; or where such disposition is in accordance with the well-known previously expressed wishes of a testator; and, further, where no doubt exists as to his testamentary capacity — the law will accept as the expressed assent to the provisions of an instrument on the part of the testator, a nod or any other means which may reasonably be presumed to intelligibly show his wishes. But the present case is not surrounded by such favorable circumstances as, in my opinion, will admit of any such presumption.

The papers propounded are, to my mind, rather the creations of the widow and her brother, Henry Herrmann, than of the decedent.

Being so well satisfied that the proofs show an inability on the part of the decedent to communicate his testamentary wishes, or otherwise to give directions for the preparation of a will in accordance with his purposes, even if he possessed testamentary capacity, I shall not consider fully, as I otherwise would, the question of whether the decedent was, at the time of the execution of the papers, imbecile. He was certainly in a deplorable physical condition — so helpless that he could not walk without assistance, was even unable to control the calls of nature, was suffering under a deprivation of the power of speech, and was under such disabilities that he was wholly subject to the influence, correct or sinister, of those who surrounded him, and who alone ministered to his physical wants. For, it must be remembered, that his sons, all of whom were married, and did not reside with their father as appears by the evidence, were scarcely ever, if at all, allowed to be alone with him; and, the only inmates of his house were his wife, her brother and her mother, all of whom were interested, directly or indirectly, in procuring from the decedent the execution of such testamentary instruments as are propounded.

There may be undue influence without absolute imbecility or other testamentary incapacity. A person may possess

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some mind, and yet be at the mercy of designing persons. The decedent being in an entirely helpless condition, he was, in my judgment, if not the unconscious, at least the submissively weak instrument of the will of his wife and her brother. Whether he had the mental capacity to comprehend what was exacted of him, there are no means of certain knowledge. Whether he was in a position or possessed capability to resist the influence of those surrounding him is, to my mind, more than doubtful; and to arrive at a probable knowledge of whether he possessed the capacity to transact any business, is to be found in the testimony, and also in the acts of his wife and her brother, Henry Herrmann.

It is urged, on their part, that the decedent engaged in business transactions during the last years of his life, that imported the existence of sufficient mental capacity to make a will.

Mr. Geissenhainer testified that he was called to the decedent's house in March or April, 1873, where a conversation was had in reference to a notice served upon him to shore up his house, on account of an excavation for a new building to be erected adjoining; but it appears that the whole conversation was carried on by Mrs. Rollwagen.

Bernhardt Schaaf and Charles Schwartz, the mechanics employed in the erection of the new building which the decedent was putting up, testified to facts connected with their obtaining their respective contracts. Whatever their inferences may have been, in respect to the acts of the decedent being the result of his own volition, there is an utter failure of proof of language used by him to show that he comprehended the business.

William Challier repaired the new house in May, 1873, but he stated that he received all his orders from Mrs. Rollwagen, and that she paid him his bill.

James Striker testified to the visit of the decedent, with his wife and her brother Henry Herrmann, to the Murray Hill Bank, in 1873, when the arrangement was made for the pay-

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ment of the check for the purchase-money of the new house. In that case there was no word spoken by the decedent, but Mrs. Rollwagen assumed to interpret what her husband said.

Henry Werner, a painter, who made an estimate for the painting of the new house, saw the decedent in May, 1873, but he states that the whole conversation was carried on with Mrs. Rollwagen and Louis Rollwagen, in the presence of the decedent, there being no proof that he spoke any words on the occasion.

William H. Sackett testified in reference to the interview resulting in the sale by him, to the decedent, of the new house; but, in this instance also, there were no utterances by the decedent, which he could understand, the conversation, on his behalf, being conducted wholly by Mrs. Rollwagen or Henry Herrmann.

Of the testimony produced by the proponents, William Finkernagel testified to visiting the decedent in July, 1873, about doing some repairing on a house in Fourteenth street, on which occasion the decedent said, "How do you do?" and "Sit down;" and said, in reference to a little child the witness had with him, "That is your girl?" "She will get big;" "Henry tells you what to do in Fourteenth street;" "Do it right," and "Call again, William."

Joseph Foerster, who did the roofing work in the new building erected by the decedent, had an interview with him in August, 1873, but the decedent spoke no word, except "money."

Christopher Bendinger called on the decedent in May, 1873, for the payment of a wine bill, and Mrs. Rollwagen paid him the amount.

John C. Hoch testified that, in April, 1873, the decedent told him that he proposed to build a house, on the corner of Stanton and Essex streets; that he had plans made by an architect named Beers; that he did not like the plans, and would not have anything to do with them; and asked him, the witness, for a good architect he was acquainted with.

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He stated also, that the decedent, in April, 1873, said that Beers, his old agent, owed him for rents, but that there was no use of crying over spilled milk. In the same year, he stated that the decedent spoke to him about the trouble he had about getting teams, and he wanted the witness to recommend some one. He testified that he understood most of the decedent's words, but once in a while, if he did not know what he said, Mrs. Rollwagen would tell him. The witness introduced Boekel, the architect, whose services were engaged, and recommended that Boekel be employed also to superintend the erection of the building. In April, he understood pretty much all the decedent said, without any motions, but in September he could not understand him.

Ernest Ohl testified, in reference to the negotiation of the sale by the decedent to him of the old house, in May, 1873, that the decedent spoke in a kind of a way, but he did not understand him, only a few words. Mrs. Rollwagen was present when the deed was signed, and she assisted the decedent to write his signature.

George Smith, who did the painting of the new house, states that he called on the decedent in April, 1873, and saw him in bed; that decedent said to him, "You nearly lost the job; I want you;" that he asked the decedent to give him a chance to estimate on it, and the decedent said, "All right;" that the next morning he estimated at \$880, and the decedent said, "That is too much, 875;" that he told him he would take \$875, and the decedent said "Go on;" that when he passed the decedent, at the new house, he said to the witness, "How you get along up there?" and he called, "Lena, some wine." He presented his bill to the decedent, who said "Lena." He had the keys lying in his bed, and she took them out and went and got the money, counted it to the decedent on the bed, and he said "Take it." In June, 1873, he again saw him about painting, and asked the decedent a dollar a room. The decedent said, "No, I want all the

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money to build a new house." Henry Herrmann said, "Who is lowest, gets it."

Julius Boekel, the architect, testified to various conversations with the decedent in May and subsequent months, as late as August, respecting the preparation of plans for a new building, the exhibition of the plans, the giving out of the specifications to the mechanics, the execution of the contracts with them, and some other matters, in some of which, he states that the decedent distinctly enunciated words and sentences, which he understood perfectly, and, at other times, Mrs. Rollwagen and Henry Herrmann interpreted what they claimed he said.

In regard to the witnesses from whose testimony the proponents infer that the decedent had the capacity to transact business, though some of them speak positively of words and sentences that were uttered by him, I am of the opinion, in view of the weight of proof, that they are mistaken in their recollection. It is a matter of common experience in the legal profession that witnesses, not charging their minds with the details of a conversation or the order in which it transpired, when their attention is called, months afterward, to what was said, are apt to put their conclusions in the form of a dialogue as occurring between themselves and another, or between others in their presence, sustaining such conclusions. In this case the parties having business transactions with the decedent assumed that he possessed the capacity to make a contract. What they were seeking was to have their own rights and interests properly guarded and protected, and provided that was accomplished, they had no interest in the manner in which the end was attained. Hence, whether the inarticulate sounds made by the decedent in response to questions by his wife or Henry Herrmann were understood or correctly interpreted by them, or whether he actually spoke the words imputed (they never expecting a controversy to arise which would make the fact important), the fact that he did not speak, but only uttered indistinct monosyllables,

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would be more apt to impress itself upon one's memory than that he did speak. The inability to speak by a contracting party is unusual in conducting business operations, while speech is the ordinary medium through which negotiations are conducted. Therefore, I place more reliance upon the testimony of those who remember that the decedent was speechless, than I do upon those who have a shadowy recollection of the utterance by him of words or sentences. And a significant fact, proven by the testimony, is, that in all of these business interviews Henry Herrmann or Mrs. Rollwagen, or both, were present, and in nearly every case the evidence shows that one or the other assumed to interpret the sounds uttered by decedent.

The testimony of Henry Herrmann on his cross-examination, is to my mind very important, in confirmation of the view that the decedent had not the capacity, about the period of the execution of these papers, to perform any acts of business.

Four of the checks, to wit : one dated August 12, 1873, to the order of Bernhardt Schaaf, for \$7,000 (Schaaf being the party who did the mason work on the building which the decedent was erecting); one dated October seventh, and payable to Schwartz & Lehmann, for \$2,300 (they being the parties who performed the carpenter work on the same building); one dated October tenth, to the order of Joseph Foerster, for \$2,200 (Foerster being the party who did the roofing work on the same building); and one dated October tenth, payable to the order of the receiver of taxes, for \$3,975, for the amount of taxes due upon the property of the decedent; all of which checks were drawn upon the Butchers & Drovers' Bank, were presented and paid at the bank, and, as appears by the evidence, the signature "F. Rollwagen" was written by the wife of the decedent, and the signature in each case, in a marked degree, resembles his genuine signature. If the decedent was competent to execute a will and codicil, and to sign with his own hand his name to each of the instruments, and to sign the

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check for the purchase-money of the new house, as testified to by Henry Herrmann, why was he not competent to affix his signature to the four checks named? The fact that he did not sign those checks, which is admitted by Henry Herrmann, is very important as bearing on the issues involved in the proceeding. It raises, to some extent, the presumption or suspicion which has been presented by the contestants, that the same hand that signed to those four checks the name "F. Rollwagen," which were paid to the contractors who constructed the building of the decedent, and paid the taxes upon his property, may have written the signature to the will and codicil; for the hand which signed those checks without authority (unless the testimony of Henry Herrmann is to be credited on the point), was the hand of the person who is the principal beneficiary under the papers propounded.

The paper offered as a will was signed on the seventeenth day of June, and the deed transferring the old house in Ninth street to Ohl was signed on the fourteenth of June. The contract for the purchase of the new house in Ninth street was signed on the seventeenth of April. On all of these occasions, Mrs. Rollwagen held the hand of the decedent when his name was signed, as testified to by Ohl and Sackett respectively. Bellesheim, when asked about this matter, stated that he did not notice the fact as testified to by those witnesses. He also stated that he did not see Mr. and Mrs. Rollwagen between the time he received the instructions and the time the will was drawn. The instructions must have been received, according to his own testimony, about eight days before the will was executed, which would fix the time at about the ninth of June, whereas he was present and saw the deed executed only three days before the will was executed, on which day both the decedent and his wife were present. Then, it is further shown that the contracts with Schaaf and Schwartz & Lehmann, for work done upon the building, were signed, upon the assumed authority of the decedent, by Henry Herrmann. In fine, there is no proof of any signature having been written by the

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decedent himself to any paper, except the will and codicil, unassisted, except on the 1st day of May, 1873; and the only proof as to that is by Henry Herrmann, who testified that Mr. Rollwagen signed in his presence the check for \$17,200, for the balance of purchase-money for the new house. It is singular, therefore, that the power to write his name by the decedent should have revived only for the purpose of signing a will and codicil; and a very strong presumption necessarily arises that he did not write his name to either instrument unassisted. Theisz testified positively that the decedent did write his name unaided, while Bellesheim, more cautious, on cross-examination, stated that he was uncertain, and he would not swear either way. Although Bellesheim was the draftsman of the will, and selected by Henry Herrmann and his sister, as I am constrained to believe, and certainly paid by her for his services on each occasion, yet there was a cautious disposition evinced by him as to this part of the transaction, and in fact as to the whole proceeding. Dr. Goulden testified, on his cross-examination, in respect to the execution of the codicil, that he did not remember at all whether he saw any one hold the pen, nor did he remember whether any one did hold it. This testimony is very obscure and unsatisfactory, as to the unassisted use of the pen by the decedent, and especially so when considered in connection with the undoubted fact (leaving out of consideration the testimony of Henry Herrmann as to the check signed the 1st of May, 1873, for \$17,200), that during the last year of his life the decedent is not shown to have signed his name to a single paper, except the will and codicil, unassisted. Another remarkable fact bearing upon the capacity of the decedent to write his name to the papers propounded is, that four days after the alleged signing of the will he was unable, according to the testimony of Boekel, the architect, to sign the contract with Schwartz, the builder. His name was signed by Henry Herrmann, under the assumed verbal authority of the decedent although the document was under seal.

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In view of the physical inability of the decedent to sign his name, as established by the proofs of so many witnesses, and of the fact that either his hand was guided by his wife, or else that Henry Herrmann actually signed the decedent's name under alleged verbal authority, I am compelled to come to the conclusion that the testimony of an actual subscription of the will and codicil by the decedent himself is very unsatisfactory.

And further, in reference to the capacity of the decedent to conduct business, the testimony as to the interview that occurred at the Butchers and Drovers' Bank — in September, according to the statement of the bank officers, and in June, as stated in the testimony of Henry Herrmann — confirms the belief that the decedent was in a most enfeebled condition at or about the time of the alleged execution of the papers propounded as the will and codicil, and, to my mind, strongly supports the testimony of Dr. Tully as to the disease under which the decedent labored, and as to his state of utter physical helplessness.

It has been claimed by the proponents that undue influence cannot be implied in this case, as exercised by the wife of the decedent; the influence being such as arises from "affection, gratitude, or love;" and that such feelings were entertained by decedent to his wife. The recognition of that kind of influence as an exception to any general rule on the subject, must depend, in its application, upon the facts and peculiar features of the case in question. It is not, it is true, unusual for a testator to bequeath all or the bulk of his property to his widow, where there are minor children, who need not only the nurture and protection of the mother, but may be placed in a state of dependence upon her, so that they may be free from the wiles and intrigues of interested parties. This is not, however, one of the cases in which parties have lived together during a long life of wedded happiness, and have reared children, so that the interests of each have become as those of one person by a long perfected union.

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Nor is it of a class in which the husband was under such extreme obligations that it would be only natural to make an exception in favor of the widow greatly disproportionate to the shares of his children by a former wife. The children of the decedent were the issue of his early marriage, and all of whom, with the exception of the grandchildren, had reached the estate of manhood. The peculiar obligations in this case certainly appear to have been almost entirely on the part of the widow to the decedent. It is true that she, during their short wedded life, ministered to his wants, lifted him to and from the bed, and even fed him with a spoon on account of his helpless condition, and bestowed other like attention. But it is not probable she married him through any great love; for it is scarcely supposable that such a sentiment could be awakened in the heart of a woman for this helpless, paralyzed man, whose speech, even at the day of the marriage, I am compelled to believe, was much impaired. Passion could scarcely have had any part with her in consenting to such a union. There could have been but few charms in his society, as he is depicted to us in the best light by even the witnesses for the proponents. It must, it seems to me, have been a marriage of interest on her part, for it elevated her from a position as a hired domestic, at fourteen dollars per month, to be the mistress of a large house, to the management of her husband's estate by her brother, to the probable control of his rents and income, and finally, to the purchase of a more elegant establishment, over which she presided at the time of his death, and in which her brother and mother became inmates, and who subsisted on the income of the decedent. For all this elevation, the enjoyment of his estate, and a certainty of at least a dower right in his realty at his death, which would be wealth to her in comparison to her former circumstances, living upon monthly wages, she, without doubt, faithfully returned the ministrations of a nurse. But her attentions could hardly have sprung, in any degree, from that affection which char-

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acterizes marriages in general, nor have been of the kind that result from a long continued and habitual intercourse, originating in love, in youth or early manhood and womanhood. I cannot resist the conclusion, from all the circumstances proven in the case, that the motive or feeling which prompted her devotion to him, did not arise either from passion or the sentiment of affection; and that its explanation may be very reasonably sought for in self-interest and design, which, in the weakness of the testator, rendered him an easy subject to the personal will and wishes of herself and brother.

Undue influence is a relative term, depending on the relation of the parties concerned to each other; their comparative ages, their temperaments, intelligence, education and habits; their physical, mental and moral health and strength, the attending and sometimes remote facts and circumstances; and, again, in all cases, more or less, on the existence and adequacy of motive for the undue influence.

Take the decedent as he was presented under the most favorable aspect by the witnesses for the proponents, and he must readily, if not powerlessly, have yielded to the undue influence of those who surrounded him when so disabled in hand and speech. Assuming that he possessed some mind, and that its emanations were exhibited in some of his actions, yet his condition must still have left him easily subservient to the will of those in the advantageous position of the wife and her brother to influence him in their own favor. Undue influence involves the idea of testamentary capacity, and the term cannot be deemed, in law, to apply to a person whose mind is gone, for it presupposes some mental power, however feeble. It supposes the presence of a stronger and healthier mind in immediate proximity with another mind enfeebled by disease, decay, or other cause, and a conscious advantage taken by one over the other.

This case furnishes, as it appears to me, one of the strongest instances I have known of the exercise of undue influence. It seems to me, indeed, that the proponents' own

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evidence proves the use of such influence. An old man of sixty-six, utterly illiterate, twice a widower, enfeebled by disease for many years, while suffering from paralysis, marries his housekeeper, who has been satisfied to accept small wages for her services. With three adult sons, the children of the companion of his early marriage, and seven grandchildren, the issue of his daughter, all of whom were kind and affectionate to the decedent; yet not one, as appears by the undisputed testimony, was permitted to hold intercourse with him except in the presence of their stepmother, or some one in her interest, even though they came to speak kindly words which might be a comfort to him whose condition seemed to render his life so precarious.

So, the housekeeper of the Rollwagen household had become its mistress. The employe for monthly wages, who had never, until the helplessness of the decedent, so far as appears, been sought after as a wife, had become the wife of a sick and helpless old man, whose days were apparently almost numbered. Her future independence was assured during the life of her husband, and her dower right in his estate would, at his decease, give her, for the residue of her own life, a large annual income. But the house in which the decedent had resided for several years, and in which she, as Magdalena Herrmann, had been satisfied to reside as an employe, and afterward as a wife of the decedent, as shown by the evidence, became unsatisfactory to her; or for some other reason a change was desired, which resulted in its sale, and the purchase of a superior dwelling. In April, 1873, when the deceased was in the helpless condition already described, his old agent, Mr. Beers, was discharged, and Henry Herrmann, the brother of Mrs. Rollwagen, was put in his place. This was only about two months before the execution of the alleged will. George, the youngest son of the decedent, having gone to California, the only residents of this house were the decedent, his wife, her brother Henry, her mother, and a domestic of whom the mother of Mrs. Roll-

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wagen was godmother. None of those related to the decedent by ties of blood were there. The family of the Herrmanns had, by this time, become the controllers of the Rollwagen household, and the Herrmanns were to the Rollwagens as *familia in familia*. Considering the prostrate, feeble and paralyzed condition of the decedent, and his speechlessness, which upon the whole of the testimony, I am bound to believe, he was inevitably subject to the influence of those who had established themselves as a family within his household. If he was not the victim of their influence, the creature of their will, and the pliant instrument of their plans, they must, considering the tenor of the provisions of the will, take the responsibility. They must rest under the natural suspicion which is cast upon them from the facts; and if the provisions contained in the two papers expressed the real wishes of the decedent, it is most unfortunate that the proponents were not provided with testimony to that effect. The widow was not called as a witness in the case. It is true that it would not have been competent for her to testify to any transaction or communication between herself and her husband. In this connection the language of judge PORTER, in the case of *Tyler agt. Gardiner* (35 N. Y. Rep., page 692), is very appropriate to the peculiar features of this case:

“When the principal beneficiary under a will prepared for execution by a party worn down by disease, and close upon the verge of death, assumes the responsibility of initiating it, of preparing formal instructions, of employing the draftsman, of selecting the witnesses, of being present at every stage of the proceeding, and of excluding those to whose inheritance a new direction is given, it behooves such beneficiary to be provided with evidence that the instrument expresses the honest and spontaneous purposes of the person who is called upon at such a time to reverse the provisions of a previous testamentary disposition, made in health and strength, in favor of those having clear claims upon the justice and bounty of the testator.”

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In this case there is entire absence of such proof in the testimony of Bellesheim, unless we accept the assumed interpretation of sounds, by Mrs. Rollwagen, the meaning of which he was himself entirely ignorant. Magdalena Rollwagen, the principal beneficiary, and her brother Henry (who must be considered under the papers in question as a beneficiary for a long period) possessed the advantage of opportunity and time for the purpose of exercising influence over the mind of the decedent, and there was no opportunity for persons opposed to their plans to counteract them.

The fraud and undue influence which may be exercised over the mind of a testator, may not be at all visible or known to the subscribing witnesses at the time of the execution, but must almost necessarily have occurred previously, the execution being the result of it. To quote further the language of judge PORTER:

"It is not to be supposed that fraud and undue influence are ordinarily susceptible of direct proof. Subscribing witnesses are called to attest the execution of wills, but not the antecedent agencies by which they are procured. The purposes to be served are such as court privacy rather than publicity. In some cases, as this court said in the case of *Sears* agt. *Shafer*, 'undue influence will be inferred from the nature of the transaction alone; in others, from the nature of the transaction and the exercise of occasional or habitual influences. The grounds for imputing it, as sir JOHN NICOLL said in the case of *Marsh* agt. *Tyrrell*, must be looked for in the conduct of the parties and in the document, rather than in the oral evidence. The necessary inferences to be drawn from that conduct will afford a solid and safe basis for the judgment of the court. Where the oral evidence harmonizes with those inferences, a moral conviction rightfully follows; but the depositions, where they are at variance with the conduct of the parties and with the *res gestæ*, are less to be relied upon.'"

It is a remarkable fact that in the preparation of the will by Bellesheim, under the instruction of Mrs. Rollwagen,

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which must not be lost sight of, she stated to him that her husband desired to make a new will as amendatory of some of the features of what is known as the "Rosenstein will;" and she handed the Rosenstein will to him to be used as the draft for that purpose, and he returned it subsequently to her. The fact that she had not produced it in this controversy being unexplained, may well be regarded with some suspicion.

I feel constrained to come to the conclusion, from the position occupied by Henry Herrmann to the decedent, and from the provisions in the will for his benefit, under which he is, for a long period of time, to be the agent for the management of the estate and is to receive three per cent of the moneys which he collects, and in regard to which there is no testimony of the intentions of the decedent, as expressed by himself directly, either as declarations or instructions to anybody, that he, equally with his sister, was a principal actor in the scheme to obtain, through circumvention, fraud and undue influence (provided the decedent had testable capacity), both the will and the codicil. The case of *Tyler agt. Gardiner* (35 N. Y. Rep.), applies with such appropriateness to the peculiar features of this case, that it is not necessary, in my judgment, to refer to other authorities to support me in rejecting the papers in question.

There is another respect in which the absence of testimony of direct declarations or expressions by the decedent himself supports the opposition to this probate. Next in importance to the disposition of property made by a will, is, usually, the selection of executors and trustees, and, in the case of a large estate, especially, to which trusts are attached that may continue many years, if not a generation, the nomination of trustees, for the purposes, must needs be a matter of great care and solicitude, even to a capable testator, who has to consider, not only the business capacity, experience, discretion and integrity, of those to whom the trusts are to be confided, but also their present pecuniary responsibility, and their liability to misfortune in the future. So that when the

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question of undue influence or circumvention arises, it is alike proper and necessary to consider what appointments of executors and trustees are made by the testator, and what powers are given to them, and also what were and are their personal relations to the testator and to the legatee, whose undue influence, fraud or wrong, is alleged as the cause of the will in question; because, in many, if not in most cases, success in the design of a will procured through such means, to be made by a person in the condition of the decedent, depends largely on the favor, relations and partiality of the trustees or executors. In this case, although one son of the decedent is made an executor and trustee (and to have omitted the choice of at least one of his own kindred, would have given more ground for suspicion), the others are, as before stated, Henry Herrmann, George Herrmann, and their sister Magdalena Rollwagen, the widow.

I have already stated, as my opinion, that there is a significant defect of any testimony of express declarations or instructions by the decedent himself, as to the disposition of his property, as provided in the two papers. I observe, in this connection, on the subject of the appointment of executors, that Mr. Bellesheim testified that Mrs. Rollwagen stated to him, when she handed him the "Rosenstein will," that the desires of the decedent were that it should be amended only so far as to give the "new house" in Ninth street to her, and the substitution of Henry Herrmann for Mr. Beers, as an executor. If Mr. Bellesheim is to be credited, that he followed these instructions of Mrs. Rollwagen in these two respects, then it may be properly inferred that Mrs. Rollwagen was named as executrix in the "Rosenstein will." In her failure to produce the old will, and the absence of any explanation thereof, I am obliged to speculate as to the executors named therein.

All the *indicia* points to the fact that, besides Mrs. Rollwagen and Mr. Beers, Frederick Rollwagen, the eldest son of the testator, was an executor named therein, for he con-

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tinued in that capacity in the amended will. Henry Herrmann was certainly not an executor named in the "Rosenstein will," for the instructions of Mrs. Rollwagen were that he should be substituted for Mr. Beers in the new will. It would be an extravagant speculation to entertain, if Henry Herrmann was not named, that his brother, George Herrmann (a small tradesman, with whom the decedent had no business relations, and scarcely any of a social character), was mentioned. It must be taken for granted that he was not an executor in the "Rosenstein will." The proponents do not claim that he was. How comes he then to be named in the amended will as an executor and trustee? The proponents have failed to even attempt to show that he was placed there by the directions of the decedent. Mr. Bellesheim, the draftsman, fails to even show that Mrs. Rollwagen represented that this was the desire of her husband.

Undoubtedly he must have come in through the direction of Mrs. Rollwagen and Henry Herrmann. The executors and trustees of the Herrmann family are as three to one of the family of the decedent. The addition of another Herrmann in the amended will "made assurance doubly sure" that there was but slight chance of the control of the decedent's estate passing away from the family of the widow. The appointment of one of the sons is not sufficient to remove my belief that the nomination of executors and trustees was not the decedent's own free will, for it would have been such an omission as to greatly increase the suspicion surrounding the preparation of the instrument.

The appointment of George Herrmann (considered by itself) is consistent only with the theory that there was contrivance exercised in procuring the insertion of his name, and that this fact was entirely unknown to the decedent. This circumstance is a very strong evidence that the papers propounded do not contain the true or full testamentary intentions of the decedent, outside of the questions of the equity or injustice of his dispositions.

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Evidence was given by three or four of the witnesses, on behalf on the proponents, as to a desire evinced by the decedent for the birth of an heir. To one he said that he wished "to live so long as he could see the baby." To another, who asked Mrs. Rollwagen, at the time she looked delicate in health, what ailed her, he said that he was going to have another heir, and that he hoped it would be a girl. To another, who told him that it was dangerous to hold a baby—that "it was catching"—he said it was all right; and subsequently, when his wife was found to be pregnant, and the same witness asked him if she did not tell him that holding a baby was catching, he shook his head and said "yes." To two witnesses, when the baby-clothes were being made, and he was told the fact, he laughed. To one he said, in a despondent mood, that he was going to die; and when she told him that he must not die, that they were going to have a christening first, "when the little Rollwagen came to town," and that he and she were going to dance down in the parlor, he said "yes;" and to Henry Herrmann he said, if he should die, he wished Herrmann to help bring up the child.

This desire, and its probable realization (provided it was ever expressed), is presented by the proponents as an important reason for the extraordinary favoritism shown by the decedent to his wife, in the disposition of his property. To my mind, such a wish on the part of a paralyzed old man (and one who was so helpless that, even at the time of the conception of the child by his wife, which, as the birth took place in the last week of November, must have occurred, according to the usual period of gestation, in February, 1873; and considering that he could move only with great difficulty, and nearly always with the assistance of others, and was suffering discomfort during the whole of the time), is strong evidence of mental weakness. He had heirs, three of whom were sons, who had arrived at the estate of manhood, with ages varying from twenty-two to forty; and he had several grandchildren, the children of his deceased daughter, Mrs. Brown-

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ing. He had, therefore, no lack of descendants; and so far as the evidence shows, both children and grandchildren were devoted and affectionate, and were almost daily callers at the house of their father, during the last year or two of his life, except the youngest son, who was in California; and he, as the proofs show, was frequently writing letters to him. Their affection was manifested in so marked a degree that, although they must have noticed the influences surrounding and controlling their father, they seemed studiously to avoid any attempt to protest against them, lest they might disturb his peace of mind and, perhaps, hazard the chances of his recovery, and certainly add to his discomfort. There was, therefore, but little probability of his property passing away for want of heirs. If he expressed the desires, as stated, for an additional heir, they must have sprung from a morbid condition of the mind of an old man, conscious of his weakness, but influenced by an unnatural vanity at his advanced period of life, which was operated upon by those surrounding him to facilitate the accomplishment of their purposes.

After a most thorough examination of the testimony in the case, I am constrained to believe that the papers propounded are, in effect, the production of Magdalena Rollwagen and her brother, Henry Herrmann, rather than that of the testator. The lawyer who prepared both instruments was not he who, for many years, had been the counsel of the decedent (Mr. Geissenhainer), and who had drawn two wills for him—one in 1854 and another in 1860—and who had had interviews with him in the years 1870, 1871 and 1872, of a professional character. That gentleman states that, during those three years, he could not understand anything stated by the decedent, and that the only means he had of judging of the desires of his client were the statements made by his wife of what she assumed the decedent said.

Henry Herrmann—whose sister is the principal beneficiary under the will, and who is himself the principal executor under it, if the instruments are sustained, and is given

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thereby a livelihood for a long period to come—I am convinced, selected the lawyer to whom should be confided the duty of preparing the testamentary instruments. Mrs. Rollwagen gave to the lawyer the instructions for a change in the provisions of the will drawn by Mr. Rosenstein, enlarging the devise, by giving to her the new house, No. 312 East Ninth street, instead of the old house, No. 334 Ninth street, and also the instructions for preparing the codicil by which four additional houses were devised to her. The attesting witnesses, I am also convinced, were solely of their selection. Not one of the sons of the decedent was consulted by them in the preparation of these papers. Not one of them was present in the house on the day of the alleged execution of either instrument, and there were only present the attesting witnesses and Mrs. Rollwagen and Henry Herrmann. The latter even procured the book which was placed upon the lap of the decedent (who was too helpless to be moved to the table), and upon which book the codicil was placed when his name was signed. At the close of the alleged execution of each instrument, Mrs. Rollwagen entered the room and paid Mr. Bellesheim for his professional services. Not one word (other than the testimony of Theisz, if that is to be credited), was said by the decedent, unless the inarticulate sounds uttered by him in response to the statements of others, on either occasion, are to be so interpreted.

A paper which disposes of the property of a man, and the decrees of which are ratified only by death, is expressed by the Saxon term "last will." I fail to find in the testimony in this case any evidence of the exercise of the *will* of the decedent in the two documents propounded as embodying his testamentary wishes. They contain, in my judgment, simply the instructions of Mrs. Rollwagen written out by Mr. Bellesheim as scrivener. The proofs fail absolutely to show that they contain the will of the decedent, as conveyed by written instructions on his part, or by any utterances of which judi-

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cial cognizance can be taken, as an assent to its provisions or the directions for its preparation.

Two of the subscribing witnesses assumed the inarticulate sounds to mean an assent to the statements made by one of them, who superintended the execution of the papers. In this assumption I am convinced they were in error. And if the decedent had testamentary capacity, it is the misfortune of the proponents that he was in such a physical condition that he was not possessed of the power of expressing his wishes to the witnesses in a form which they could not misunderstand, and which would commend itself to the conscience of the court. In this failure, owing to the peculiar condition of the decedent, the law leaves the disposition of his property as defined by the statutes of distributions and descents. In the absence of such testimony—which it was absolutely impossible from the condition of the decedent, to obtain, even if there were not, on the other hand, so much testimony to militate against the idea of his having the power to express his wishes—it would be a straining after probate by the court to sustain the papers propounded as the will of the decedent, which appear to me to be inequitable and unjust to his lineal descendants, inasmuch as they allow so considerable a proportion of his estate to pass into the possession of a family alien to their blood, and to the prejudice of their own presumed natural claims.

The law in general disposes of property, in case of intestacy, according to principles most in harmony with natural ties. Nevertheless, the statute of wills recognizes the arbitrary right of a decedent to dispose of his property as may best accord with his own desires, even in the most inequitable manner, provided the requirements of the statute are complied with, and that he possessed at the time of the execution of the instrument the *animus testendi*, and was free from undue influence. This right, as to real estate, is subject to but one exception—that of dower of a widow in such real estate, which cannot be taken from her without her

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assent. While this testamentary power should be maintained by courts to the fullest extent, they must guard against the substitution, for the will of a decedent, of instruments which are not so much the expressions of his will as of other interested persons, who take advantage of their positions toward him, unduly to influence, and who improperly assume to direct their preparation and execution; as, in my judgment, may in this case be truly said of Magdalena Rollwagen and Henry Herrmann.

In conclusion, I deem it plainly my duty upon the evidence, to decide that the due execution of either the will or codicil is not sufficiently proved; and, even assuming that the decedent had testamentary capacity, and that the requirements of law respecting the forms of execution are shown to have been complied with, yet the evidence convinces me that neither of the two papers in question truly expresses the decedent's real purposes or intentions in the disposition of his property, and that he did not fully comprehend their provisions; and, further, to decide that the proofs clearly establish that both instruments—and such execution thereof as is shown—were the result of undue influence and other unlawful means, rendering the same void; therefore, that both will and codicil should be rejected as not entitled to admission to probate.

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SUPREME COURT.

PATRICK H. TOOMEY agt. LATIMER ANDREWS, impleaded
with JEWELL HARVEY.

Amendment of answer — Service by mail.

Where an answer is served by mail, which does not admit of a reply, and is not in fact, replied or demurred to, the defendant's time to amend it, of course, is limited to twenty days next after the day of service.

Section 172 of the Code, analyzed and explained.

Where the original answer was served by mail, and the plaintiff's attorney on the second day thereafter, noticed the cause for trial at the next circuit, and before the end of forty days, but after twenty days thereafter, the defendant served an amended answer, which the plaintiff's attorney immediately returned with notice that he declined to receive it, on the ground that it was not served in time, and also that the plaintiff accepting it would lose the circuit:

Held, that the plaintiff's objections to receiving the amended answer were valid, and that the judgment taken by him at the circuit, by default of the defendant's appearance, was regular.

Monroe Special Term, January, 1872.

MOTION by defendant Andrews, to set aside judgment as irregular, or for leave to answer on terms. The action is brought on a promissory note made by the defendants, payable to the plaintiff. Andrews alone defended. The original answer was served by mail, November fifth; November seventh the plaintiff noticed the cause for trial at the Ontario circuit. On the eleventh of December, three days before the circuit, the defendant served an amended answer by mail; immediately on its receipt, the plaintiff's attorney returned the amended answer with a notice that he declined

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to receive it on the ground that it was not served in time, and also that the plaintiff by accepting it would lose the circuit. On the first day of the circuit, the cause having been reached in its order, was tried in the absence of the defendant and the plaintiff took judgment.

The original answer contained three counts, the first of which alleged, in substance, that Andrews signed the note as surety for his co-defendant, Harvey; the second, that he signed as surety and the plaintiff had not taken any steps to collect of Harvey, and the third denied every allegation in the complaint inconsistent with the allegations in the first and second counts. The amended answer was the same in substance as the original, with an additional count, which alleged substantially, that the defendant signed the note as surety; that shortly after the note became due the plaintiff, for a valuable consideration, and without the knowledge or consent of Andrews, agreed with Harvey to extend the time of payment; that when the note became due Harvey was solvent and able to pay; that the plaintiff unreasonably neglected to collect of him, and that Harvey is now insolvent.

J. Horr, for defendant.

T. H. Bennett, for plaintiff.

JAMES C. SMITH, J.—In the case of *The Bank of Monroe* agt. *Geib* (not reported), decided at the Monroe special term in October last, I held, that where an answer which was served by mail, did not admit of a reply, and was not, in fact, replied or demurred to, the defendant's time to amend it, of course, was limited to twenty days next after the day of service.

The correctness of the decision depends upon the construction of section 172 of the Code. The language of the section relating to the matter, is as follows: "Any pleading

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may be once amended by the party, of course, without costs, and without prejudice to the proceedings, at any time within twenty days after it is served, or at any time before the period for answering it expires, or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless," &c. Here, then, are three several periods of time within which a pleading may be amended. (1.) Within twenty days after it is served; (2), at any time before the period for answering it expires, which, if the pleading is served personally, is twenty days, and if served by mail is forty days after service; and (3), at any time within twenty days after service of answer or demurrer to such pleading. These several provisions do not apply to all cases indiscriminately, but each is appropriate to a particular class. Thus, to take them up in their inverse order, the third relates only to those cases in which an answer or demurrer to the pleading is actually served; the second, to those in which the pleading admits of an answer, but none has been served at the time of amending; and the first applies to all other cases. And in each case the right to amend is subjected by certain words of the section, which are not transcribed above, to the power of the court to strike out the amended pleading when it appears to be put in for delay, and will cause the loss of a circuit or term.

As the answer in this case did not set up a counter-claim, the plaintiff could not reply to it without leave of the court (*Code*, § 153), and, consequently, the case is not within the second clause. Neither is it within the third, because no reply or demurrer was in fact served. Necessarily, therefore, the case is controlled by the first clause of the section.

In answer to these views it may be suggested that the word "answering" used in the second clause means answering *or demurring*, and, consequently, that as the original answer of the defendant in this case, like every other pleading of fact, could be demurred to (whether successfully or not, is immate-

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rial), and the plaintiff had forty days to demur, the defendant had the same time in which to amend.

That position is not tenable. It is true the term "answer" is sometimes used in a broad sense to include every pleading that may be interposed to a complaint, but it is not used in that sense in the second clause of section 172. As used there it has no reference to a demurrer. It relates to pleadings of *fact* exclusively, and it includes a reply as well as an answer. That it does not include a demurrer is apparent from the context, for in the third clause, where a demurrer as well as an answer is intended, each is expressly mentioned. Such meaning is also apparent from the course of legislation by which section 172 has been moulded into its present form. Section 148 of the Code of 1848 provided that "any pleading may be amended by the party, of course, without costs and without prejudice to the proceedings already had, at any time before the period for answering it shall expire." By the amendment of 1849 the section was numbered 172, and to the words last above quoted the following were added: "Or within twenty days after the answer to such pleading shall be served." That the terms "answer" and "answering," as used in the original section and also in the amendment of 1849, were not intended to include a demurrer, is obvious from the fact that the right to amend a pleading, after it had been demurred to, was expressly given by another section of the Code of 1849. Section 174 of that Code provided that, "after demurrer either party may amend any pleading demurred, of course, and without costs, * * * within twenty days," &c. That provision was needless and superfluous, if the case of a demurrer was intended to be covered by section 172 as it then stood. Equally significant was the legislation of 1851. In that year the provision of section 174 above referred to respecting amendment after demurrer served was abrogated, and section 172 was amended by inserting the words "or demurrer" in the last clause, where they still remain. These considerations seem to establish the construc-

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tion above suggested. It results from that construction that the second clause above stated applies only to the case of a pleading which admits of an answer.

The construction is reasonable. If the meaning of the second clause is that an answer may be amended, of course, at any time before the period for demurring to it expires, it follows that, in every case in which mail service is proper the party who serves an answer may double his time for amending it by serving it by mail. It follows, also, that although in the case of an answer to which a reply may be served, the plaintiff's attorney can at once limit the time for amending to twenty days by serving his reply, yet, if the answer does not admit of a reply, his proceedings are practically stayed for forty days by the act of his adversary, unless he chooses to take the risk of a motion to set aside the answer as dilatory, or of treating it as a nullity. A construction leading to consequences so mischievous and absurd, is not to be adopted if it can be reasonably avoided. The provision of the Code (*sec.* 412) that where the service is by mail it shall be double the time required in cases of personal service, is intended for the benefit of the party served.

The defendant's counsel cites the cases of *Washburn* agt. *Herrick* (4 *How.*, 15) and *Evans* agt. *Lichenstein* (9 *Abb. [N. S.]*, 141). They do not conflict with the views above expressed. The first was decided under the Code of 1848, which, as has been seen, prescribed but one period of time in which a pleading might be amended, of course, to wit, "at any time before the period for answering it shall expire." And it is to be inferred from the report of that case that the answer was one which could be replied to. Under the Code of 1848 a reply could be served to any answer containing new matter (*sec.* 131). *Evans* agt. *Lichenstein* was decided on the authority of *Washburn* agt. *Herrick*, and for ought that appears it, also, was the case of an answer to which a reply could be served.

I adhere to the decision made in *The Bank of Monroe* agt.

Toomey agt. Andrews.

Geib and hold that the amended answer was properly returned for the reasons stated, and that the plaintiff's proceedings were regular.

The plaintiff's counsel also suggests as a ground for treating his practice as regular, or at least for not setting it aside, that the amended answer, as well as the original, was frivolous. That suggestion rests upon the position that as the note, on its face, does not show that the defendant signed it as a surety, he cannot resort to parol evidence to establish the fact. The point is not well settled, though the recent cases of *Campbell* agt. *Tate* (7 *Lans.*, 370) and *Benjamin* agt. *Arnold* (5 *N. Y. S. C. R.*, 54), cited by plaintiff's counsel, favor his position. But it is unnecessary to decide that point in this case, or to express an opinion upon it. The question here is one of pleading and not of evidence. For ought that appears the defendant may be prepared to prove his suretyship by competent evidence in writing. The original answer was clearly frivolous; but the defense set up for the first time in the amended answer, is good if it can be proved.

Upon the first ground stated the motion to set aside the judgment as irregular is denied, with costs.

But the application for favor is granted on terms. The defendant may serve an answer containing the matters set up in the third and fourth counts of his amended answer, in three days after service of the order herein, on condition that he take three days' notice of trial for the February circuit in Ontario; and that, before the first day of that circuit, he pay the costs of the trial had at the December circuit, and ten dollars costs of opposing this motion, and that the judgment stand as security.

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SUPREME COURT.

SIMON SALOMON agt. MARCUS VAN PRAAG.

Action for claim and delivery of personal property — fraudulent representations.

Where personal property is obtained from the owner through fraudulent representations, no demand from the vendee, before suit brought, is necessary. It is otherwise where the possession of the vendee is lawful. Where the defendant has purchased from the fraudulent vendee the property, with knowledge of the fraud, the same rule applies; no demand is necessary before suit brought.

A jury is the proper tribunal to pass upon the facts and circumstances tending in any degree to establish fraud in the defendant, and it is incumbent on the defendant to satisfy the jury that he is a *bona fide* purchaser.

Trial Term, February, 1874.

ACTION for claim and delivery of personal property.

The vendor parted with his goods through the fraudulent representations of one Prowlee. The goods were afterward found in the possession of the defendant, against whom the action was brought. The defendant claimed to be a *bona fide* purchaser, from the fraudulent vendee, without notice or knowledge of the fraud, and for a valuable consideration.

The jury rendered a verdict for the plaintiff, and a motion was made for a new trial.

Mr. Sanders, for plaintiff.*Mr. Fogarty*, for defendant.

VAN VORST, J. — The grounds urged by the defendant's counsel for a new trial on the minutes, are :

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1. That no demand of the property was made of the defendant, before the commencement of the action.

2. That the plaintiff has neither returned, nor offered to return the notes of Prowlee, received on the sale to him.

3. That the evidence is insufficient to justify the verdict.

If the defendant was not a *bona fide* purchaser of the property, then he was not lawfully in possession, and it was no more necessary to demand the property from him before commencing the action, than it would have been of Prowlee himself, had the action been against him, before he parted with the possession.

Before the holding of personal property by one who is lawfully in possession can be called wrongful, even as against the true owner, a demand should be made upon him of the property, and then his refusal to deliver would justify an action for a wrongful detention (*Talcot agt Belding*, 4 J. & S. [*Sup. Ct. R.*], 84, and cases cited).

But the verdict of the jury must be considered, as having established not only that Prowlee's purchase was fraudulent, but also that the defendant was not a *bona fide* purchaser from him for a valuable consideration.

Now it must be conceded that the evidence tending to show guilty knowledge in the defendant is slight, circumstantial in character, and not inherently conclusive. Yet uncontradicted, and unexplained it is sufficient, as it is inconsistent with entire innocence, and indicates at least that he had reason to suspect the goodness of Prowlee's title. This evidence is attempted to be both contradicted and explained.

And if the evidence of the defendant is reliable, it may be well considered that the proof of defendant's participation in, or knowledge of the fraud is overcome by his positive denial of knowledge of Prowlee's guilt, and by his statement that he had paid a valuable consideration for the property.

Yet as the transaction involved a question of good faith, and as to whether or not the defendant was free from any

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notice of Prowlee's fraud, either actual or constructive, it was deemed to be a case for the judge, under proper instructions.

In *Hubbard agt. Briggs* (31 N. Y., 538), WRIGHT, J., says: "The case was one of fraud, and ordinarily such a case is not capable of being established by direct affirmative proof. Any evidence, having a tendency, though it may be slight, to establish fraud is not incompetent (*Newman agt. Cordell*, 43 Barb., 448).

It was considered that the jury was the proper tribunal to pass upon the facts and circumstances tending in any degree to establish fraud in the defendant, as well as his evidence of good faith by way of denial and explanation, and the *credibility of the various witnesses.*

And it may be urged, with good reason, that in all cases where the good faith of the party in his action is under consideration, and is a substantive matter, the determination of such question, upon all the facts and circumstances, is for the jury.

The question, therefore, whether a demand was necessary to be made upon defendant before suit brought, is involved in the decision of the principal question as to whether or not the defendant was a *bona fide* purchaser, and which, by the verdict of the jury, is determined adversely to the defendant.

It was incumbent on the *defendant* to satisfy the jury that he was a *bona fide* purchaser (*Duer agt. Brandt*, 53 N. Y. 462).

If there was any evidence on the subject in a case involving fraud and good faith, it was proper that the matter should be submitted to the jury, and, it having been decided by them, it does not seem reasonable that the verdict should be set aside, and a new trial ordered, although the judge before whom the trial was had may differ from the conclusion to which the jury arrived.

The objection that it was necessary for the plaintiff to return the notes taken by him from Prowlee on the sale, in order to work a complete rescission of the contract, was not

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taken on the trial, where the notes could still have been offered to be returned or canceled, had the objection been taken, and it cannot be urged on this motion.

The questions involved in this motion are not free from doubt. But the exceptions taken by the defendant's counsel to the rulings at the circuit may be considered by the general term, and, if well founded, may afford relief so that no injustice be done

The motion for a new trial is denied.

Dowdney agt. McCollom.

COURT OF APPEALS.

ABRAHAM DOWDNEY, appellant, agt. GEORGE W. MCCOLLOM,
respondent.

Proceedings in foreclosure of mechanics' lien in the city of New York.

The plaintiff made a contract with the defendant, by which he undertook to furnish all the building stone and brown sand necessary for the erection of fourteen houses upon the lots of the defendant, and to do certain filling specified in the contract, for the sum of \$23,000, to be paid and accepted as follows: By conveying to him, or his assigns, by deed, &c., the second of said houses easterly from Fifth avenue, on the northerly side of Seventy-fourth street, describing the lot and the provisions of the deed by which, and the incumbrances subject to which, the same was to be conveyed, and \$9,000 cash, to be paid as specified in the contract.

Held, that it was the intention of the parties that the plaintiff was to have the lot, subject to the conditions specified in the contract, and \$9,000 cash, in consideration of performance of the contract on his part, and was not obliged to accept \$23,000 cash for the whole, at the election of the defendant.

Also, that the plaintiff had the right to enforce the conveyance of this lot, and in case of the inability or refusal of the defendant to convey it as specified in the contract, to recover its value, although exceeding the sum of \$14,000.

But this relief could not be given to the plaintiff in proceedings to foreclose the mechanic's lien; because such proceeding is entirely statutory, and the court can exercise no power except such as is conferred by the statute; that is, to determine the amount due the lienors, to order a sale of the property, distribute the proceeds, to give personal judgment, and to issue execution.

December, 1874.

THIS proceeding was commenced in the New York common pleas to foreclose a mechanic's lien, filed for \$15,212.65,

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on property situate on Madison avenue, in that city, and was tried before David McAdam, as sole referee, who reported in favor of the plaintiff for \$954.20, balance of the money installments under the contract; and as to the conveyance of the house under the provisions of the contract, the referee dismissed the plaintiff's complaint, on the ground that such relief could not be awarded in a mechanics' lien proceeding.

The plaintiff appealed from the decision of the referee to the general term of the common pleas.

The common pleas affirmed the judgment of the referee, and the plaintiff appealed to the court of appeals.

Alex. Thain, for appellant.

Mr. Ashbel, for respondent.

GROVER, J. — By the assignment of Williams to the defendant of his contract with the plaintiff, and the undertaking of the former, upon a sufficient consideration, with Williams, to perform the same on his part, the defendant became liable to the plaintiff, the same as though he had originally contracted with him instead of Williams. The plaintiff insists that upon performance by him he was entitled to be paid \$23,000, \$14,000 of which at the option of the defendant, might be paid by conveying to him a house and lot, as specified in the contract. But in case of the failure or neglect of the defendant to make the conveyance, he is entitled to be paid the whole sum in cash.

On the part of the defendant it is insisted that, upon performance of the contract by the plaintiff, he is entitled to the payment of \$9,000 in cash, as provided by the contract, and to the conveyance of the house and lot as specified in the contract, and in case of the refusal of the defendant to convey, his only remedy is to enforce a specific performance of this part of the contract, or a recovery of damages for the breach, which would be the value of the lot, at the time of the default

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of the defendant to convey, as required by the contract. The solution of this question must be determined by the construction of the contract. By that the plaintiff undertook to furnish all the building stone and brown sand necessary for the erection of fourteen houses upon the lots of the defendant, and to do certain filling specified in the contract for the sum of \$23,000, to be paid and accepted as follows: By conveying to him or his assigns by deed, &c., the second of said houses easterly from Fifth avenue on the northerly side of Seventy-fourth street, describing the lot and the provisions of the deed by which, and the incumbrances subject to which, the same was to be conveyed, and \$9,000 cash to be paid as specified in the contract. As to the latter, no question is made by the parties. As to the former the question is, whether the defendant's contract is simply to convey the house and lot as specified in the contract, or whether he is bound to pay the plaintiff \$14,000 in cash in case of his neglect or inability to convey as required. The plaintiff insists that the contract gives him no right to enforce the specific performance of a conveyance of the lot. He relies upon the case of *Pinney agt. Gleason* (5 *Wend.*, 393), to sustain this position. It was there held, that, upon a note by which the maker promised to pay \$79.50 in salt, at fourteen shillings per barrel, at a time specified, there could only be a recovery upon default of the maker of the sum therein specified. The case shows that this conclusion was based upon a construction of the contract, from which it was held, that the sum specified was the amount actually due from the maker to the payee, and that the provision for the payment otherwise than in cash was intended for the benefit of the debtor only, and consequently it was optional with him to make the payment in the manner provided, and that in case he failed so to do, he must pay the sum in money, and was not obliged to pay the actual value of the salt. Upon the construction put upon the contract the legal rule as to the obligation and rights of the parties was clearly right.

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Numerous other cases, involving the same question, are cited by the counsel for the plaintiff, but they were all disposed of upon the principles applied in *Pinney agt. Gleason*. But they do not determine what is the true construction of the contract in the present case.

Upon a careful consideration of the language of the contract, I am satisfied that it was the intention of the parties that the plaintiff was to have the lot, subject to the conditions specified in the contract, and \$9,000 cash in consideration of performance of the contract on his part. That the sum of \$23,000, to be paid to him, was inserted not as the amount to be actually paid to him, but rather as fixing what was the supposed value of the interest in the lot to be conveyed, which the contract shows was assumed to be \$14,000. The plaintiff has the right to enforce the conveyance of this lot, and in case of the inability or refusal of the defendant to convey it as specified in the contract, to recover its value, although exceeding the sum of \$14,000.

The language of the contract shows that this was the intention of the parties, and the law requires that this intention should be carried into effect.

The counsel for the plaintiff insists that if this be so, such relief should have been given in this proceeding to foreclose the lien. An examination of chapter 500, page 850, of the Laws of 1863, under which the proceedings were had, will show that this could not be done. The proceeding is entirely statutory, and the court can exercise no power except such as is conferred by the statute.

That confers power only to determine the amount due the lienors, the priority of their respective liens, to order a sale of the property subject to the liens, and distribute the proceeds according to the rights of the parties, and to give a personal judgment in the proper cases against the parties liable to pay the amount found due, and issue execution against such parties for its collection. No power is given to decree the performance of any other act or process provided

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for the enforcement of any such decree. It is true that a lien may be filed and the same enforced where payment is to be made otherwise than in money (*Phillips on Mechanic's Liens*, sec. 129); but in such cases the court must determine the amount that is to be paid in money, and then proceed in the same manner as though such amount had been required to be so paid by the contract.

In the present case the defendant agreed to convey to the plaintiff a specified lot. But the plaintiff had made no demand of the deed, or shown any inability of the defendant to make the conveyance. The defendant was not, therefore, in default for not having made the conveyance (*Hudson agt. Swift*, 20 *Johns.*, 24; *Fuller agt. Hubbard*, 6 *Cowen*, 13; *Camp agt. Morse*, 5 *Denio*, 161. See also *Sugden on Vendors*, 8th *Am. ed.*, 358). The plaintiff was not, therefore, entitled to a judgment for the value of the lot to be conveyed. It is no answer to this that the proceedings of the plaintiff to foreclose the lien were hastened by the defendant, as provided by the act. He should have taken care, before doing so, to be able to prove the inability of the defendant to convey or to put him in default by demanding a deed.

The referee rightly dismissed the complaint in respect to the lot, leaving the plaintiff unembarrassed to pursue his remedy in respect thereto before the proper tribunal; and the judgment of the general term, affirming his judgment, must be affirmed with costs.

All concur.

Excelsior Savings Bank agt. Campbell.

SUPREME COURT.

THE EXCELSIOR SAVINGS BANK, respondent, agt. SAMUEL CAMPBELL and others, appellants.

SAME agt. SAME.

Answers held to be frivolous.

Where the defendants, in their answer to an action to foreclose a mortgage for non-payment of interest, denied that the defendants were in default in the payment of \$280, &c., which became due and payable on the 27th day of September, 1873, and nowhere averred that the interest had been paid, nor denied that the plaintiff was entitled to the amount claimed to be due, nor was any material fact put in issue by the answers, *held*, that the answers were frivolous.

General Term, First Department, October 30, 1874.

APPEAL from orders overruling answers as frivolous.

W. S. Palmer, for appellants.

F. F. Van Derveer, for respondents.

LAWRENCE, J. — I think that the answers in these cases were properly held to be frivolous by the court at special term.

The answers do not allege that the interest was paid by the defendants, nor do they deny that the defendants have failed to comply with the conditions of the bonds by omitting to pay the interest. The denial is that the defendants were in default in the payment of \$280, &c., which became due and payable on the 27th day of September, 1873. It is

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nowhere averred that the interest has been paid, nor is any fact pleaded which tends in any way to show that the amount claimed is not due to the plaintiff, nor is it denied that the plaintiff is entitled to the amount claimed to be due. In fact, no material fact is put in issue by the answers; they simply deny that the defendants were in default, which is a conclusion of law. The case of *Youngs* agt. *Kent* (46 N. Y., p. 672) cited by the appellants' counsel does not, as I understand it, aid the appellants.

In this case the answer was held to deny that the quantity of sugar delivered was the same as stated in the complaint. This was a material allegation which the plaintiff was bound to prove; and it is quite evident, from the opinion delivered by the court, that the denial in question alone prevented the the affirmance of the order for judgment which had been granted by the court below.

The orders of the special term are therefore affirmed, with ten dollars costs, in each case.

DAVIS, P. J., and DANIELS, J., concurred.

De Bary agt. Stanley.

NEW YORK COMMON PLEAS.

FREDERICK DE BARY *et al.* agt. D. AUGUSTUS STANLEY *et al.**Examination under sections 190 and 191 — production of books and papers.*

The examination of a party before trial under sections 190 and 191 of the Code, does not authorize the issuing of a subpoena *duces tecum* to bring up the party's books and papers. They are distinct proceedings.

General Term, November, 1874.

APPEAL from order at special term overruling objections of defendant by order allowing subpoena, *duces tecum*, to bring up defendants' books and papers upon the examination of defendant before trial, under sections 190 and 191 of the Code.

W. H. Arnoux, for defendant.*W. L. Flagg*, for plaintiff.

ROBINSON, J. — The mode of obtaining inspection of an adversary's books and papers is pointed out by the Revised Statutes (*R. S.*, part 3, ch. 1, tit. 3) and the rules (*Rules* 13, 19, 20, 22).

The mode of obtaining the inspection and copy of a particular paper is pointed out by section 288 of the Code. The examination of a party before trial, under sections 190 and 191 of the Code and Rule 21, is wholly distinct from the foregoing remedies, and does not include any more than it supercedes them. The case of *Bonesteel agt. Lynde* (3 *How.*, 226)

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does not sustain the order, for that was a subpoena, *duces tecum*, served upon a party upon the trial. In the case of *People* agt. *Dyckman* (24 *How.*, 322) the point was not directly involved, and the case was subsequently overruled. The better authority is contained in *Hauseman* agt. *Sterling* (61 *Barb.*, 347) and *Woods* agt. *Defiganieri* (16 *Abb.*, 159).

Order appealed from reversed.

DALY, C. J., and J. F. DALY, J., concurred.

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SUPREME COURT.

PHILIP STEVENS, appellant, agt. THE CORN EXCHANGE BANK,
respondent.

A correct decision for a wrong reason—bona fide purchaser for value—liability of bank to pay certified checks.

A correct decision is not to be reversed, because the reason upon which it may have been placed may prove untenable.

To entitle the holder of a check to be protected as a *bona fide* holder for value, it must appear that he has parted with something of value as the consideration for which the check was received; his contingent agreement to pay value for it, but never having actually done so, is not a sufficient consideration.

So where partial value only appears to have been parted with upon the faith and transfer of commercial paper, the right of the holder to recover upon it has been restricted to the amount of such value.

By certifying a check the bank obligates itself to hold so much of the drawer's credit or funds as may be required for the purpose of its payment, when it shall be presented.

Where the drawer of a check, having sufficient funds in the bank to meet it, procures the check to be certified by the bank, and then lays the check aside among some of his other papers, where it remains six or seven years—having forgotten it, during which time he has drawn out all of his funds in the bank, he cannot compel the bank to pay the amount of the check again because it is merely outstanding.

And a purchaser of such check, who is not a *bona fide* holder for value, stands in no better position to enforce its payment from the bank than the drawer.

General Term, First Department, October, 1874.

APPEAL from a judgment recovered on the report of a referee.

Ely & Smith, for appellant.

James W. Gerard, for respondent.

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DANIELS, J.—This action was brought to recover the amount due upon a check drawn by Lawrence R. Jerome on the defendant, for the sum of \$2,500, payable to the order of Catherine H. Jerome, and indorsed by her. The check was dated on the 5th day of May, 1862, and certified as good at that time, by the teller of the defendant. It was not charged to the account of the drawer, who then had more funds on deposit in the bank than were required for its payment; but a memorandum of its amount was made in figures on the margin of his account in one of the defendant's ledgers. The check was delivered by the drawer to the payee, his wife, and she indorsed and returned it to him. He placed it in a box of unimportant papers, where it remained and was forgotten until about the 18th or 19th of January, 1869, when it was casually discovered and the next day delivered to the plaintiff. The drawer, Lawrence R. Jerome, testified that he had been the attorney in fact of his wife, the payee, for twenty years, and that he did business in her name, or as agent—which meant her—in 1862, and transferred the check to the plaintiff, for which he was to have an interest in an oxygen gas company of \$2,500. This was his statement as a witness; but the plaintiff, by observing greater precision in the terms used to describe the arrangement, did not state it quite as favorably to the validity of the transfer; and as he was the person affected by the evidence, there can be no impropriety in adapting his own statement as the truth. Before the transfer of the check to him, the drawer, Lawrence R. Jerome, drew from the bank all the money he had in it, on deposit, except fifty-three cents. At the close of the plaintiff's case, the defendant moved for a nonsuit, for the reason that the action had not been commenced within six years after the right to maintain it had accrued. This motion was denied, but the referee finally reported in the defendant's favor; and that appears to have been done upon the ground that the drawer's account had been reduced to the small balance already mentioned, with the assent of the payee, and

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probably for her benefit, and the great lapse of time intervening between the certifying and transfer of the check. It is not necessary to determine whether the referee rightly denied the motion for a nonsuit, nor whether he was correct in treating the check as dishonored when the plaintiff received it. For, if he was not a *bona fide* holder, under the evidence given, and the facts found, the conclusion of the referee cannot be disturbed, because the reason assigned in support of it may, upon further examination, prove to be unsound. A correct decision is not to be reversed, because the reason upon which it may have been placed may prove to be untenable (*Monroe agt. Potter*, 32 How. P. R., 49; *Holt-singer agt. Corn Exchange Bank*, 37 id., 203, 206; *McGregor agt. Buell*, 1 Keyes, 153, 155, 156).

That the plaintiff did receive the check subject to all legal and equitable defenses against it in the hands of Catherine H. Jerome, as it was found he did by the referee, is quite apparent from the evidence given by himself as a witness upon the trial. His evidence was that he sold Lawrence R. Jerome one six-hundredth interest in the profits resulting from a patent for explicating oxygen gas; no interest in the patent was transferred, and it was not represented by any stock. But as the plaintiff in terms described it, it was merely his personal engagement to account to him for one six-hundredth part of the profits, if any; and whether there ever might be any profits whatever, arising out of the invention, remained in a state of uncertainty. For he stated that the patent had not been tested in this country; but it had in Europe; and what the result was of the test made of it was not made to appear.

The only consideration, under this state of the evidence, which Lawrence R. Jerome received for the check, was the executory agreement of the plaintiff to pay over this small share of the profits of the patent, in case any should ever be realized from it. This was not the advancement of anything on the faith of the check, but simply a contingent agreement

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to make an advance at some future uncertain period of time; and it was not shown that it ever had been followed by the payment of even a single cent upon it. The plaintiff parted with nothing whatever for the check, and if he fails to collect it from the defendant he will be no worse off in consequence of having received it. Such a failure will deprive the promise he made of the consideration which existed for making it, and, as a necessary consequence, terminates his liability upon it. He can lose nothing, therefore, even if the check should prove uncollectible in his hands; and as long as that appears to be the case, he cannot be protected as a *bona fide* holder of it for value. To entitle him to that protection the evidence should show him to have parted with something of value as the consideration for which the check was received, while that which was given on the trial simply showed that he had contingently agreed to pay value for it, but never had actually done that.

In the case of *Fulton Bank* agt. *Phoenix Bank* (1 *Hall*, 562), it was held that receiving negotiable paper by a bank and simply placing it to the credit of the person from whom it was taken, was not parting with value for it so as to enable the bank to hold it against the rights of the real owner. The same thing was also maintained in the cases of *Clark* agt. *Ely* (2 *Sand. Ch.*, 166) and *Clarke Nat. Bank* agt. *Bank of Albion* (52 *Barb.*, 592); and for the reason upon which this rule has been established, where partial value only appears to have been parted with upon the faith and transfer of commercial paper, the right of the holder to recover upon it has been restricted to the amount of such value (*Williams* agt. *Smith*, 2 *Hill*, 301; *Condwell* agt. *Hicks*, 37 *Barb.*, 458; and cited approvingly in *Lawrence* agt. *Clark*, 36 *N. Y.*, 128, 130; *Staaken* agt. *McDonald*, 6 *Hill*, 93, 96; *Parsons* on *Bills and Notes*, vol. 1, 191, and cases cited in note; *Huff* agt. *Wagner*, 63 *Barb.*, 215; *Wintle* agt. *Crowther*, 1 *Crompt. & Jervis*, 316; *Weaver* agt. *Barden*, 49 *N. Y.*, 286). This application of the principle, as well as the authorities support-

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ing it, seem to have been overlooked in the case of the *Park Bank* agt. *Watson* (42 N. Y., 490). But in view of the more recent support accorded to it by the same court in the preceding case cited, that may safely be regarded as substantially overruled. Still, as this case requires no such conclusion to support the position that the plaintiff was not shown to be a holder of the check in controversy for value, it is not necessary to definitely decide that point in the present instance.

The question is, therefore, presented whether Catherine H. Jerome could have recovered the amount of the check from the defendant if she had endeavored to do so at the time it was delivered to the plaintiff. For if she could not, then the plaintiff himself must fail, because he stands in the same situation as long as he received it without paying anything of value for it.

By certifying the check, the defendant obligated itself to hold so much of the drawer's credit or funds as might be required for that purpose for its payment, when it should be presented (*Farmers and Mechanics' Bank* agt. *Butchers and Drovers' Bank*, 14 N. Y., 623; 16 *id.*, 125; 28 *id.*, 425; *Meads* agt. *Merchants' Bank of Albany*, 25 *id.*, 143; *Merchants' Bank* agt. *State Bank*, 10 *Wallace*, 604).

While she held and owned the check, she possessed the right to have that credit and those funds applied to its payment whenever she elected to require that to be done, and, without her consent and authority, the defendant could not direct or apply them to any other purpose; but if she consented that a different application or disposition should be made of them, and it was accordingly done, after that she could not consistently claim payment of the check; for that would secure to her full benefit of all that might otherwise be required upon the check.

But, in a different manner, she was entitled to \$2,500, out of her husband's account, by means of the check and its acceptance, and to nothing more than that; and if that has been secured to her in an indirect manner, the effect will be

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the same as though it had been done by means of the immediate instrumentality of the check itself. That it was so secured was found as a fact by the referee, and may readily be inferred from the evidence; for the money was all drawn out by her husband while he was her general agent and acting in her behalf. That it was designed to be under his complete control is apparent from the circumstances that he was her agent; that when he carried on business it was in her name; that the check was returned to him soon after its delivery to her, and remained among their joint papers without any attention to it on the part of either of them, until it had been forgotten, and the money due upon it had been received and used by him through other instrumentalities.

These facts warranted the conclusion deduced from them by the referee, that Catherine H. Jerome had assented to her husband drawing out of the bank, and using, the money he there had deposited for her benefit to pay the check.

It was a diversion of it for his or their joint benefit, with her implied consent and authority; and, after that, it would be, morally as well as legally, unjust to allow her to enforce payment of the same amount again because the check itself had been inadvertently left outstanding.

The judgment against the plaintiff was, for these reasons, entirely right, and it should, therefore, be affirmed, with costs.

Williams agt. Allen.

SUPREME COURT.

WILLIAMS, Assignee, respondent, agt. ALLEN *et al.*, appellants.

Character of action determined by complaint—referable actions.

Where an answer sets up a counter-claim and claims damages by way of recoupment, it does not change the character of the action in the complaint founded on contract, nor render the action non-referable.

One item of account made up of a large number of small charges which would require to be proved on the trial is sufficient ground of reference.

New York General Term, October, 1874.

APPEAL by defendants from an order of reference.

Coles Morris & Michael H. Cardozo, for appellants.

Culver & Bertrand, for respondent.

LAWRENCE, J. — I think that the order of reference in this case should be affirmed. In *Welsh agt. Darragh* (52 N. Y., 590), it was held that the character of an action must be determined by the complaint, and that if that is upon contract the action is referable; and although the answer sets up a counter-claim and claims damages by way of recoupment, it does not change the character of the action, or render it non-referable.

It is quite apparent that the trial of this action may, and that it probably will, involve the examination of a long account (52 N. Y., 590, *supra*).

It is true that the defendants state, in the affidavit read in opposition to the motion, that the only items which will be

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disputed by the defendants are the items on the debit side of the account, under the date of March 4, 1873, relating to the gold coupons part due, and the premium thereon, and also for the amount overcharged for advertising bill, estimated at \$1,508.

This last item of \$1,500 is the aggregate of bills of amounts alleged to have been disbursed by the defendants for advertising, under the agreement between them and the plaintiff's assignor (*Case*, p. 17, fol. 51). The examination of these bills must require the scrutiny of a large number of small charges, and the verification of the same. Under these circumstances, I am not disposed to interfere with the order of the special term.

It must be affirmed, with costs.

DAVIS, P. J., and DANIELS, J., concurred.

In the Matter of Lippman.

SUPREME COURT.

IN THE MATTER OF LEVY LIPPMAN.

How executions on docketed judgments issue from marine court of New York.

In the marine court in the city of New York, when judgments of that court are docketed in the county clerk's office, executions thereon must be issued to the sheriff. On all other judgments, execution may be directed and issued to either the sheriff or to a marshal.

The general rule of the marine court, adopted November 9, 1874, which requires all other process, except orders of arrest and attachments, to be directed to and executed by the sheriff, contravenes the statute, and must fall before it. That part of the rule in respect to issuing orders of arrest and attachments, to either the sheriff or marshal, is not affected by this decision.

At Chambers, January, 1875.

MOTION for the discharge of Levy Lippman on *habeas corpus*.

Breon & Gearson, for petitioner.

Brown, Hall & Vanderpoel, for sheriff.

DAVIS, P. J.—The petitioner is imprisoned by an order of the special term of the marine court for contempt. It is admitted by counsel that the alleged contempt consisted in the willful persistence of the petitioner, who is one of the marshals of the city of New York, in levying and attempting to execute a process of execution issued upon a judgment recovered in the marine court, in violation of one of the rules of that court.

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On the ninth of November last the general term of the marine court adopted the following rule:

"Orders of arrest in all cases, and attachments against the property of non-residents of the county, issuing out of this court may be directed to the sheriff or either of the marshals detailed to this court by the mayor. All other process must be directed to and executed by the sheriff."

The petitioner is one of the marshals detailed to the marine court by the mayor. The question presented in the case is whether that part of the rule which requires all executions to be directed to and executed by the sheriff is valid.

The marine court may undoubtedly make such general rules as it may deem advisable to regulate the practice of that court, provided such rules are not in contravention of the provisions of any statute or of the general rules of courts of record, adopted by the convention of judges and familiarly known as the "rules of the supreme court."

It is insisted that so much of the general rule of the marine court as affects the execution issued to the petitioner is in conflict with the provisions of the statutes applicable to that court.

The third section of the act of 1865 (*Sess. Laws*, 1865, *chap.* 400, *p.* 738), provides that "any summons, warrant, attachment, execution or other process issued by any of the justices of the marine court in the city of New York, or by the clerk of said court, may be served and executed by any marshal of said city."

This provision operated as a modification of the act of 1857 (*chap.* 295, *sec.* 1), which declared that all process (except summons) issuing out of said court should "be directed to, and served by the sheriff of the city and county of New York;" and the effect of the modification was that executions on judgments of the marine court could be executed by either the sheriff or a marshal (*See The Matter of Ott*, 13 *Abb. [N. S.]*, 293).

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These statutes seem to have remained unchanged until the act of 1872 (*chapter 629, Laws of 1872, p. 1493, vol. 2*). The eighth section of the last cited act provides that "a judgment of the marine court, for the sum of twenty-five dollars, or over, exclusive of costs, the transcript whereof is docketed in the office of the clerk of the city and county of New York, shall have the same effect as a lien, and be enforced in the same manner as the judgments of the court of common pleas for the city and county of New York. All process except the summons shall be directed to and executed by the officers as now prescribed by existing laws, who shall be subject to the control of the said marine court, in respect thereto with the like power, and in same manner, and with like effect, as is now by law given to and exercised by the said other courts of record."

The first provision of this section operates to make a docketed judgment of the marine court a lien on the real estate, and to provide for its enforcement, which is to be done "in the same manner as the judgments of the court of common pleas." The judgments of that court are liens when docketed, and are enforced by execution directed and issued to the sheriff.

The sheriff alone is clothed with the powers necessary to the enforcement of such liens by the sale and conveyance of real estate, and, therefore, for very obvious reasons the execution of a judgment of the marine court, when docketed under the act above cited, is committed to his hand.

The second provision of the section was evidently designed to confer on the marine court the control over the officers of every description by whom its process can be issued that is possessed by other courts of record. It was not intended by that provision to make any change in respect to the officers to whom the process of the court could be directed. On the contrary, the existing laws on that subject were preserved; and they remained in full force, except as modified by the provision of the same section in respect to judgments which

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have become liens by being docketed in the county clerk's office.

The result is, that on all docketed judgments execution must be issued to the sheriff. On all other judgments, execution may be directed and issued to either the sheriff or to a marshal.

The execution in this case was issued upon a judgment which had not been docketed. It was, therefore, lawfully directed to a marshal.

The officer to whom an execution is lawfully delivered is bound to proceed with it, and is subject to penalties, both civil and criminal, for a refusal or neglect.

The general rule of the marine court, so far it relates to this question, contravenes the statute, and must fall before it.

These views substantially accord with the opinion of SHEA, C. J., in *Lehman agt. Faltenmeyer (MSS.)*, which is now before me.

The result is, that the provision of the rule referred to was void; and its disobedience by the marshal, not accompanied by any contumacious conduct on his part, except the simple assertion of the right to levy and enforce the execution, could not be lawfully punished as a contempt.

The prisoner must be discharged.

Neuman agt. Goddard.

SUPREME COURT.

WILLIAM M. NEUMAN, respondent, agt. GEORGE H.
GODDARD, appellant.

Jurisdiction in action for personal injury committed in another state—incompetent evidence which will authorize a new trial.

It is now settled that the courts of this state will entertain jurisdiction of actions for personal injuries committed abroad, when both or either of the parties are citizens of the United States.

Where on the trial incompetent evidence is admitted, after objection, which might affect the minds of the jury, the subsequent direction of the judge, in his charge to the jury, that such evidence be disregarded by them, does not cure the error in first receiving it.

General Term, First Department, March, 1874.

APPEAL from a judgment entered on the verdict of a jury in favor of the plaintiff.

James C. Carter, for appellant.

Joseph Larocque, for respondent.

LAWRENCE, J.—The plaintiff alleges that the defendant, with others, acting as a vigilance committee, in the city of Camden, in Arkansas, on the 14th day of May, 1861, with force of arms, entered the store of the plaintiff and ejected him therefrom, and seized and carried away the stock of goods in the store, with all the books, papers and private effects of the plaintiff, and converted and disposed of the same to their own use, and thereby broke up and destroyed

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the plaintiff's business; and damages are claimed for the injury resulting to the plaintiff.

On the trial it was contended by the counsel for the defendant:

First. That this court has no jurisdiction, so far as the action is to be regarded as brought to recover for the personal injuries sustained by the plaintiff; and,

Secondly. That the defendant having been subsequently discharged as a bankrupt, under the bankrupt law of the United States, such discharge is a bar to this action.

As I have come to the conclusion that a new trial must be granted upon two of the objections and exceptions taken by the defendant's counsel, it will be unnecessary to consider the effect of the discharge in bankruptcy; and as to the question of jurisdiction the case of *De Witt agt. Buchanan* (54 Barb., 32) seems to be conclusive.

In that case justice JAMES denies the doctrine laid down by chief judge DALY in *Molony agt. Dows* (8 Abbt., 316), and says: "It is now settled that the courts of this state will entertain jurisdiction of actions for personal injuries committed abroad, when both or either of the parties are citizens of the United States."

Upon the trial the plaintiff was allowed to testify, under the objection and exception of the defendant's counsel, to threats made by defendant, of personal injury or violence to the plaintiff, after the ejection of the plaintiff from his store, and after the seizure and conversion of the plaintiff's goods.

He was also permitted to testify, under like objection and exception, that the goods taken from his store, before the close of the war, enhanced in value from 100 to 200 per cent in gold.

The justice before whom the cause was tried, in his charge to the jury, upon the request of the defendant's counsel, directed the jury not to take any of this evidence into consideration, in fixing the amount of damages sustained by the plaintiff.

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I think that the evidence was incompetent, and that the subsequent direction to the jury to disregard it does not cure the error in first receiving it.

The threats made by the defendant, after the trespass and wrongful acts averred in the complaint had occurred, were not a part of the *res gestæ*, but threats to commit separate and independent torts. They constituted no part of the cause of action stated in the complaint; and, as they were made after that cause of action had arisen, I do not see how such threats tended to show the animus of the defendant toward the plaintiff in committing the acts referred to in the complaint.

The evidence as to the rise in the value of the goods, seems to me to have been equally irrelevant and incompetent.

It was assumed that the plaintiff would have remained in Camden throughout the war, and that he would have continued to be the owner of the goods until the great increase in values had taken place.

The rule which should govern in this case is well stated by judge GROVER in *Erhen* agt. *Loullaid* (19 N. Y., 302, 303). There the justice, in charging the jury, directed it to disregard certain evidence which he had admitted. Judge GROVER says:

“The plaintiff’s counsel insists that this, if error, was cured by the charge. When illegal evidence, properly excepted to, has been received during a trial, it must be shown that the verdict was not affected by it, or the judgment will be reversed. If the evidence may have affected the verdict, the error cannot be disregarded. The rights of the parties can only be preserved by adhering to this rule. It would be in vain to observe the rules prescribed by law to secure an impartial jury, if their minds are to be subjected to the influence of illegal evidence after they are empaneled. It does not follow that impressions thus obtained will have no effect, although the judge directs them to disregard the evidence.”

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See also *Travers* agt. *Eighth Avenue Railroad Co.* (3 *Keyes*, 499).

In this case it cannot be said that it appears that the evidence objected to did not affect the minds of the jury in arriving at their verdict.

On the contrary, I think that it is quite apparent that the evidence may have affected and did affect their minds, in reaching a conclusion. The case is one which, in its nature appeals very strongly to the sympathies and passions; and the evidence was calculated to inflame and excite the sympathies of the jury.

The verdict rendered was large in amount, and as the evidence may have enhanced the verdict, I do not think that we can disregard the error.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and DANIELS, J., concurred.

Underwood agt. Farmers' Joint Stock Insurance Co.

COMMISSION OF APPEALS.

WILLIAM H. UNDERWOOD, respondent, agt. THE FARMERS'
JOINT STOCK INSURANCE COMPANY, appellant.

Delivery of a verified account of loss to an insurance company — condition precedent must be strictly complied with.

Where the policy of insurance makes it a condition precedent to plaintiff's right of recovery that he should deliver to the company a verified account in writing of his loss within ten days after the loss, it becomes a part of the contract of insurance, and effect should be fairly given to it as to every other part of the contract.

Where there is a conflict in the evidence on the trial that this condition has been waived by the defendant, it is error for the judge to decide, as matter of law, that it has been waived, and, hence, that non-compliance with it, on the part of the plaintiff, does not defeat the action.

The evidence in such case should be submitted to the jury to determine whether there has been a waiver or not.

Whether there can be any waiver of a condition precedent, except there be in the case an element of estoppel, discussed, but not decided by the court.

Decided May 28, 1874.

APPEAL from the judgment of the general term of the supreme court of the third department affirming a judgment entered for plaintiff upon the verdict of a jury.

The action was brought to recover upon a policy of insurance, issued by defendant to plaintiff, upon a barn and property situated in Onondaga county. The property was destroyed by fire in July, 1868. One of the conditions annexed to the policy of insurance was, that the insured should in case of loss, forthwith give notice to the secretary of the company, and, within ten days after such loss, deliver in a particular account of such loss, signed and verified.

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Two defenses were set up in answer, and relied upon in the trial. That the verified account of the loss was not delivered within the ten days, and that the plaintiff himself set fire to the property insured.

Other facts appear sufficiently in the opinion.

Pratt, Mitchell & Brown, for appellant.

A. P. Smith, for respondent.

EARL, C. — Upon the trial the judge submitted to the jury but one question of fact, to wit: Whether the plaintiff himself set fire to the barn insured, and charged them to render a verdict for the plaintiff if they found that question in his favor. To this portion of the charge the defendant's counsel excepted.

It is not disputed that it was by the policy a condition precedent to plaintiff's right of recovery that he should deliver to the company a verified account in writing of his loss within ten days after the loss. This condition was part of the contract of insurance, and effect should be fairly given to it as to every other part of the contract. It is undisputed that no account of the loss was delivered to the defendant or any of its agents until about one month after the loss. But the judge at the trial held, as matter of law upon the evidence, that this condition had been waived by the defendant, and, hence, that non-compliance with it on the part of the plaintiff did not defeat the action. It therefore becomes necessary to examine the evidence upon this question.

The plaintiff testified that on Monday after the fire, which was on Friday night, he called upon one Seloner, who was the agent of the defendant, by whom the insurance was effected, and informed him of the fire, and asked him what he should do, and he told him to wait until the general agent came, and said that he would write to the general agent, and promised that he and the general agent would in a few days call upon him, and make affidavits and straighten

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the matter up; that, in about a month, they came to him, and the general agent drew up an affidavit, which he verified, giving an account of the loss, and they took it; that they then left him, saying that upon their return they would straighten the matter up; that they returned in the afternoon of the same day, and talked with the plaintiff, but did not adjust or pay the loss. The plaintiff also proved that, about three weeks after this interview with the general agent, he caused another account of the loss to be drawn up and verified and sent to the secretary of the company, by whom it was returned with a notification that it was rejected because it was not made and delivered within the time required by the policy. This was the first notification received by the plaintiff that he was in default for not delivering the verified account of his loss in time.

Such is the case made by plaintiff upon this question, and if this had been all the evidence, I think the judge might well have held, as matter of law, that the condition in question had been waived. Seloner was the local agent of the company who effected the insurance. The proof does not show what his precise powers were, but he testified that he had been allowed to adjust and pay losses without first consulting the company, and that he had taken a large amount of insurance for it, and he seems to have acted for the company in reference to this loss with its knowledge and sanction. It is proper, therefore, to hold that the company would be bound by what he said and did in reference to settling and paying the loss as detailed in the evidence of the plaintiff. This agent, when informed of the fire, and asked by the plaintiff what to do, told him to wait until the general agent came, and that he and the general agent would be along in a few days, and draw the affidavit, and straighten the matter up. The plaintiff had the right to infer from this that he had nothing more to do until the general agent came, and that his affidavit giving an account of his loss would then be drawn and be in time.

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But the most material part of this evidence is contradicted. Seloner testified that plaintiff called upon him at the time mentioned, and notified him of the fire; that after inquiring as to the circumstances of the fire, and expressing his suspicions about it, he told him that he would call and look the matter over during the week, and if he found it fair and square the company would pay, if otherwise, not. He denied that he said a word about the general agent, or about making out the papers, or that he promised to make them out. He testified that on the Thursday following, less than a week from the time of the fire, he did call upon the plaintiff in reference thereto, told him that the matter looked bad, that he was accused of burning the barn, and that he must account for his whereabouts on the night of the fire before the company would pay; that in about four weeks after this he and the general agent called upon the plaintiff, and asked him to go to a justice of the peace and make an affidavit, as the matter looked suspicious and they wanted to pry into it; that he went with them and made the affidavit, which, although not literally, was substantially, except as to time, a compliance with the condition annexed to the policy; that they then told him that they did not feel safe in paying him a dollar, and could not do it with propriety, but that they would pay him \$200 rather than go to law about it. The judge was asked to charge the jury, substantially, if they believed this evidence of Seloner, that the action was successfully defended and he refused, and to his refusal defendant's counsel excepted.

I think the learned judge erred in refusing this charge. There was conflict in the evidence, and as the judge disposed of the question as one of law, and refused to submit the evidence to the jury, we are bound to take that view of the evidence most favorable to the defendant which the jury might have taken. Taking the evidence of Seloner then, there was no compliance with the condition, and no waiver of it. He did nothing within the ten days to induce the plaintiff to believe that he was not bound to deliver the veri-

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fied account of his loss within the time specified in the policy. What he did and said on the contrary showed that the company would scrutinize the loss, and probably contest it, and should have made the plaintiff scrupulous in a strict compliance with all the requirements of his policy. Instead of delivering his affidavit within the ten days, he waited about a month, until the local and general agents called upon him. They then drew an affidavit, not for the purpose of a compliance with the condition, but to enable them to pry into the cause of the fire, which they regarded as suspicious, and they then informed him that they could not pay the loss, except upon the compromise which they proposed. In drawing and keeping this affidavit there certainly was no waiver of the condition. The doctrine of estoppel lies at the foundation of the law as to waiver. While one has time and opportunity to comply with a condition precedent, if the other party does or says anything to put him off from his guard and induce him to believe that the condition is waived, or that a strict compliance with it will not be insisted on, he is afterward estopped from claiming non-performance of the condition. Unless there is some consideration for a waiver, or some valid modification of the agreement between the parties, which contains the condition, I think there can be no waiver of a condition precedent, except there be in the case an element of estoppel. At the time when the affidavit was drawn the plaintiff had forfeited his rights under his policy. Nothing that was there said or done induced him in any way to forego any of his rights, or to omit the performance on his part of anything required by his policy, and, hence, furnished no estoppel against the defendant. In *Clark agt. The New England Fire Ins. Co.* (6 Cush., 342); *Underhill agt. The Agarwan Mutual Fire Ins. Co.* (6 Cush., 440); *Bumstead agt. The Dividend Mut. Ins. Co.* (12 N. Y., 81); *Post agt. Aetna Ins. Co.* (43 Barb., 351); *Ames agt. The N. Y. Union Ins. Co.* (14 N. Y., 253); *Trustees First Baptist Church agt. Brooklyn Fire Ins. Co.* (19 N. Y., 505), and all the

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other similar cases that have fallen under my observation—with one exception, which will be hereafter noticed—the waiver claimed was based upon the conduct of the defendants or their agents at a time when the plaintiffs could have complied with the conditions. The true rule, I think, is laid down by MULLIN, J., in *Ripley agt. The Aetna Ins. Co.* (30 N. Y., 136), as follows: "It seems to me that a waiver to be operative must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition." And in that case, there was held to be no waiver upon facts fully as significant as the undisputed facts in this case.

The case of *Owen agt. Farmers' Joint Stock Ins. Co.* (57 Barb., 518) is apparently in conflict with the views above expressed. That was an action against this same company, and the policy sued on contained the same condition as the one under consideration. In that case, the plaintiff was absent from home at the time of the fire, and the proof of loss was not delivered to the company within the ten days. But more than a month after the fire the agent of the company stated to a party interested in the policy, that it made no difference, and that the proofs could be sent in after the return of the plaintiff, and they were sent in after his return, after a further delay of about six weeks. It was held, upon these facts, that the condition was waived. If all the facts in that case appear in the opinion, I cannot doubt that the court fell into error by not noticing the distinction between a waiver before forfeiture and one made afterward. In that case there was no estoppel, as the plaintiff did not delay until after the ten days in consequence of anything said or done by defendant's agent. There was no consideration for the waiver and no valid agreement to waive the condition. Although that case is said to have been affirmed in the court of appeals, the opinion of that court is not fur-

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nished, and we are unable to see the precise ground upon which the affirmance was based.

In this case, the facts should have been submitted to the jury with proper instructions, and if they had found that, in consequence of what the defendant's agent said or did before the expiration of the ten days, as testified to by the plaintiff, he was induced to delay compliance with the condition until after that time, then there would have been a waiver of the condition, and non-compliance with it would have furnished no defense to the action. But my brethren are unwilling to express an opinion upon the doctrine of waiver as I have stated it, but concur with me in reversing the judgment, upon the ground that the judge erred in holding, as a matter of law, that the condition was waived, and that the evidence in reference thereto should have been submitted to the jury.

Judgment reversed, and new trial granted; costs to abide event.

All concur.

Ackart agt. Lansing.

COURT OF APPEALS.

DAVID ACKART, appellant, agt. GILBERT V. LANSING and
GEORGE H. LANSING, respondents.

Contributory negligence.

Whether the plaintiff was guilty of contributory negligence in standing in front of a circular saw in motion are questions of fact for the jury upon the facts stated.

It is the duty of saw-mill owners so to provide it with customary or available machinery and appliances as that it should be reasonably free from a likelihood to accident.

The plaintiff was not bound to give his instructions to the principal, and it was not a voluntary or needless act to pass by the principal and enter the mill to give instructions to the practical agent.

Decided December, 1874.

APPEAL by the plaintiff from a judgment rendered by the general term of the supreme court setting in the third department, affirming a judgment of nonsuit ordered by Mr. Justice JAMES at the Saratoga circuit, January, 1873.

R. A. Parmenter, for appellant.

The defendants owned and operated a saw-mill at Stillwater, and one Ford was their sawyer in the mill. They were doing custom work and invited the plaintiff specially to bring his logs to their mill for sawing, and he did so in the month of February, 1871.

Afterward, and on the 28th of February, 1871, the plaintiff went to the mill for the purpose of giving some directions about the sawing of his logs. He found Ford, the sawyer,

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and both defendants at the mill. On making his business known to the sawyer, the latter informed the plaintiff that if he would help them they would immediately draw his logs upon the log-way and saw them. The plaintiff complied with that suggestion and his logs were accordingly placed on the log-way. The plaintiff had two sorts of logs, chestnut and pine, thirteen feet long. The sawyer and one of the defendants were engaged in sawing an oak log about ten feet long. They had taken off the slab, and that lay unfastened on the top of the log, and the circular saw was cutting a plank from the log and straight-edging the loose slab at the same time. The carriage upon which the log lay was some fifteen inches from the floor of the mill. There were rollers to catch the plank as fast as sawed; but for a log of this length the second roller was not near enough to the first one to catch the plank. Just after the saw had started the plaintiff stepped back into the mill the second time, fifteen or twenty feet distant from the saw and about three feet to the left of the range of and in front of the saw, for the purpose of giving the sawyer specific directions as to the manner in which he wanted the pine logs sawed. The saw being in motion, as before stated, and causing some considerable noise, the plaintiff remained in his position a few moments in order to deliver his message to the sawyer. The sawyer was then standing by the side of the saw, the plaintiff being some eighteen feet behind him, and the defendant, Gilbert V. Lansing, stood at the other end of the log. Before the saw had run clear through, Lansing took hold of the loose plank that was being straight-edged and raised it up; and in doing so the saw caught the other end of the plank and whirled it violently in the direction of the plaintiff. It struck the plaintiff and broke his leg.

A similar occurrence had taken place at this mill a few days previously to the knowledge of the defendant, Gilbert V. Lansing, who alluded to it immediately after the plaintiff had been injured. The defendants claimed that the cause of

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the injury was the fact that the rollers were not rightly placed — being too far apart for that log. It would have been easy to have placed the rollers nearer together. They should have been placed so as to catch any length of log sawed. The true cause of the injury was, doubtless, this: Mr. Lansing, in taking hold of one end of the loose plank carelessly, caused the other end of it to be caught in the saw. The identical plank was produced in court and it showed the saw had caught it. When the plaintiff first went into the mill the saw was not running, but when he returned to give specific directions as to sawing one log the saw had been started. Ackart was not cautioned by any one not to enter the mill.

. At the close of the plaintiff's testimony the defendants' counsel moved for a nonsuit on four grounds. The plaintiff's counsel requested the court to submit to the jury, for their determination, every question of fact involved in the issue, but the court declined to do so and directed a nonsuit.

I. A nonsuit is never proper when questions of fact are involved, unless a verdict for the plaintiff would be set aside as against evidence upon some fact necessary to be established on behalf of the plaintiff; and, in the consideration of such a question, the defendant must concede every fact and conclusion which the evidence, fairly construed, conduces to establish against him and in favor of the plaintiff. At the circuit the court was specially requested by the plaintiff's counsel to submit to the jury, for their determination, every question of fact involved in every branch of the issue.

II. The evidence tended to show negligence on the part of the defendants. The jury might, with propriety, have found that it was negligence to straight-edge with a circular saw a loose plank in no manner held or secured, except by its own weight; and especially to so handle the plank as to cause it to be caught by the saw in motion and thrown against a customer of the mill who was rightfully, and without objection, there on business.

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III. It was the duty of the defendants to so manage their saw-mill as not to endanger the life or limb of their customer. Not only were they bound to run the mill with prudence and care, in respect to all persons not trespassers or guilty of negligence, but they were in duty bound to properly construct the machinery and apparatus by which the mill was managed.

"The owner or lessee of a dock, pier or wharf receiving tolls for its use is bound to keep it in reasonably good condition so that, as far as by the use of ordinary care, diligence and skill he can make it so, it shall be fit for the use of vessels and safe for all persons to enter upon who have a right of access. If the wharf owner receives tolls from the public generally he owes this duty to the public, and is liable to any one specially injured by his neglect to fulfill it" (*Shearman & Redfield on Negligence* [2d ed.], § 585; *Pittsburgh agt. Grier*, 22 Penn. State R., 54; *Kendall agt. Baxter*, 12 Gray, 494; *White agt. Phillips*, 15 Com. Bench [N. S.], 245; *Buckbee agt. Brown*, 21 Wend., 110; *Roadway agt. Briggs*, 37 N. Y. Rep., 256; *Driscoll agt. Newark Lime, &c., Co.*, 37 N. Y., 637).

The principle of these decisions is decisive of the case at bar.

IV. No opinion was delivered at the general term of the court below, but it seems the nonsuit was sustained on the ground that the plaintiff was himself guilty of contributory negligence. He certainly did nothing which, in the least degree, interfered with the working of the mill. The only thing done by him was to step under the roof of a custom saw-mill, eighteen feet distant from the saw when the log being sawed was each successive moment receding from him. And he was there without objection or warning, and for the legitimate purpose of giving specific instructions as to the manner in which he desired the sawyer to cut up one of his logs. This was not necessarily contributory negligence; and if it tended (which I deny) in that direction, the question

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should have been submitted to the jury as requested by the plaintiff's counsel. Contributory negligence is peculiarly a question of fact for the jury; and it must be a very clear case of contributory negligence, appearing upon uncontradictory evidence, which will justify the withholding of that question from the jury. That has been held repeatedly by this court (*See Albany Law Journal*, vol. 8, pp. 125, 189, 350; Vol. 9, pp. 190, 309).

The judgment should be reversed and a new trial granted, with costs to abide the event.

E. F. Bullard, for respondent.

At the time the plaintiff went back to the mill the second time he had no occasion to do so, as one of the proprietors stood in the yard near by him to whom he could have given any desired instructions.

Instead of doing so he passed by the principal and went to the servant where the accident happened.

He knew the proprietors, and that Ford was only a servant.

I. In going back the second time the plaintiff was a mere volunteer.

The nonsuit was therefore properly granted.

II. There was no conflicting evidence, and hence no fact for the jury (*Tinney agt. Boston & Albany R. R. Co.*, 52 N. Y., 632).

III. The defendants did not owe the plaintiff any duty when he went back the second time (*Harty agt. R. R. Co.*, 42 N. Y., 468, 472).

IV. Even if they did owe a duty to the plaintiff, "such care only is required as a man of ordinary prudence and capacity may be expected to exercise in the same circumstances" (*Unger agt. Forty-second St. R. R. Co.*, 51 N. Y., 497).

In *Spencer agt. Campbell* (9 *Watts, and Ser.* 32), a man

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drove a horse to the defendant's steam grist-mill to get some grist which he had ground, and while there the boiler exploded and killed the horse.

Held, the defendant was not liable without proof of actual negligence.

"The utmost possible care is not required. Indeed, its exercise would require an extent of time and caution that would terminate half of the business of the world" (*Loop agt. Litchfield*, 42 N. Y., 361).

The turnpike, wharf and pier cases cited by the plaintiff's counsel have no application to the case at bar. A pier, wharf or turnpike is made on purpose for travel. The owner or proprietor is bound to have them in good repair.

The saw-mill is not made to be run by the public; the latter have a right to demand that their lumber be properly manufactured, but the mill owner owes them no other duty.

V. The plaintiff is precluded from recovering by his own acts.

Plaintiff is not free from blame in going back the second time, as there was no occasion for it. By so doing he, without cause, and for no purpose, and carelessly, places himself in position to receive the injury (*Van Shaick agt. H. R. R. Co.*, 43 N. Y., 527).

The plaintiff was guilty of gross negligence in placing himself directly in front of the saw, where he was sure to be injured if any accident happened. He might as well stand in front of a cannon while being loaded.

"One cannot recover for an injury, even for gross negligence in the lawful use of another's property, unless he is free from culpable negligence on his part" (1 *Cow.*, 78).

VI. There was no proof of negligence on the defendants.

The judgment should be affirmed, with costs.

FOLGER, J.—I do not think that the plaintiff was properly to be termed a volunteer; he certainly was not a trespasser. Having property in the charge of the defendants, at

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their solicitation to be worked upon by them and for their profit, he had the privilege of going upon their premises to see to it and to give directions concerning it. He was not chargeable with negligence in going upon their ground. Nor was it a voluntary or needless putting himself in the way of danger to go into the mill, there to give instructions to the practical agent of the defendants, the sawyer, and when there, to await quiet for that purpose, unless he had reason to expect the accident which occurred, or some result like unto it, or unless the circumstances, as shown by the testimony, were such as that a man of ordinary prudence and care for personal safety would, in the exercise of due caution, have refrained from so going and so awaiting.

The circumstances do not show a case of negligence so clear as that a court could, as matter of law, pronounce the plaintiff guilty of contributory negligence.

The least which the plaintiff was entitled to ask was a submission of that question to the jury, upon all the facts of the case.

The defendants, owning the mill and themselves carrying on a business, dependent for its profit to them upon the resort to it of their neighbors with their logs, owed a duty to their customers that the mill and its appliances should be reasonably safe for those who had right or license to come into it for a mutual purpose (*see Swords agt. Edgar, in MSS., decided Nov. 17, 1874*). It was their duty to arrange and carry it on, so to provide it with customary or available machinery and appliances as that it should be reasonably free from a likelihood to accident and injurious effects.

The testimony given did, then, present questions of fact for a jury; whether the plaintiff was hurt by a plank thrown against him, whether it was so thrown by the act of Gilbert V. Lansing, combining with the action of the saw upon the plank, or whether it was thrown by reason of the rollers being too far apart to carry so short a plank; whether such result had happened before to the knowledge of the

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defendants; whether they were thereby chargeable with notice that they were likely to happen again; whether they arose from want of skill or from carelessness in the use of the gearing and appliances of the mill in actual use, or were the necessary and customary effect of the use thereof; whether they were thus unavoidable, or might have been avoided by greater and required care, or by the use of other and better appliances in the mill, which could at reasonable cost and convenience be obtained, and whether, on the consideration and determination of these inquiries, the defendants were, in fact, the negligent cause of the injury to the plaintiff?

These questions of fact should have been submitted to the jury with proper instructions as to the law governing their determination.

I do not assert that there was negligence in the defendants, but the lack of it was not so absolutely clear as that the court could pass upon it as a matter of law. There was a question for a jury. Hence, the judgment should be reversed, a new trial granted, with costs to abide event.

All concur, except CHURCH, Ch. J., absent.

NOTE. — This case was retried at the Saratoga circuit, January 27, 1875, before Hon. JOSEPH POTTER and a jury, and resulted in a verdict of \$500 in favor of the plaintiff, and a second appeal has been taken.

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SUPREME COURT.

ANNA KADE agt. MAX LAUBER *et al.**Dower — divorce.*

A former wife is not entitled to dower in land, the title to which was acquired by the former husband subsequent to a judgment, in favor of the wife, in an action for divorce on the ground of the adultery of the husband.

Special Term, January, 1875.

VAN VORST, J.—This is an action to recover dower. Plaintiff was married to Charles Kade in the year 1857. The marriage was dissolved by judgment in an action brought by the plaintiff herein against her husband.

The divorce was a *vinculo matrimonii*.

The lands out of which the plaintiff claims to be endowed were acquired by her former husband in 1868, and after the parties had been divorced. In 1869 Kade sold and conveyed the land to the defendant, who is still the owner. Plaintiff did not join in the conveyance. Kade died in 1873.

The Revised Statutes provides that a widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage (1 *R. S.*, 740, *sec.* 1; *Id.* [5th ed.], vol. 3, p. 31, *sec.* 1).

In order, therefore, to entitle the widow to an estate in dower, there must have been seizen in the husband during the marriage.

Wait agt. Wait (4 *N. Y.*, 95) was a new case. It was there first decided that a divorce, dissolving the marriage

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contract on the ground of the adultery of the husband, does not deprive the wife of her right of dower in his real estate. But in that case the husband had been seized before the divorce of the real estate to which the widow was held to be endowed. In that case the court noticed the distinction between a divorce at common law, which declared the marriage void *ab initio*, and under the statute, which was a dissolution of the marriage relation for causes happening subsequent to the marriage, and which still left to the wife—when the complainant—her rights in her husband's lands secured by the marriage. Such acquired interest and rights were not divested or lost by the dissolution of the marriage contract. But that case decides no more than that the wife is endowed of all the lands of which her husband was seized at any time during coverture.

The decree of divorce under the statute puts an end to the marriage. The marriage contract is dissolved from and after the decree.

In *Cropsy agt. Ogden* (11 N. Y., 234) JOHNSON, J., says: "Parties once married, but whose marriage has been dissolved, can in no legal sense be said to be husband and wife." Where the husband is the guilty party the former wife may marry again and acquire rights incident to such new relation. It is true that under such circumstances the former husband cannot marry again until the death of his former wife, but such prohibition is a penalty for his infidelity to his former marital vows and obligations; and a breach of the prohibition is a misdemeanor, but is not within the penalty of the act against bigamy. "The restraint of the defendant as to a second marriage arises not out of the marriage contract, or from any continuing obligation to his former wife, but exclusively from the positive prohibition of the statute" (*The People agt. Hovey*, 4 Barb., 117).

When the case of *Wait agt. Wait*, above cited, was in the supreme court, in which a majority of the judges held that a woman who has obtained a decree of divorce, a *vinculo mat-*

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rimonii, for the adultery of her husband, is not, after his death, entitled to dower in his real estate — Judge WILLARD, who dissented, in the opening of his opinion, says: "The main question raised is whether the complainant is entitled to dower in lands whereof her husband was seized during the coverture, prior to the divorce for adultery committed by him, she being the innocent and he the guilty party" (4 *Barb. Supreme Court R.*, 210; *Willard on Real Estate*, p. 71; *Burr agt. Burr*, 10 *Paige*, 25, 26).

The marriage, therefore, between the parties having been dissolved, and the relation of husband and wife having ceased to exist, prior to the seizen in Kade of the land in question, the plaintiff has no estate in dower therein.

And there should be judgment for the defendant, with costs.

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SUPREME COURT.

CHARLES C. GOVE and another agt. HUGH HAMMOND.

Report of referee — no statement of facts or conclusions of law — irregularity.

Where on a trial before a referee, where considerable evidence has been given on questions of fact, the referee reports: "I find that the plaintiffs have failed to establish the facts necessary to sustain the complaint. I do therefore find that the defendant is entitled to a judgment dismissing the complaint, with costs," the report is nothing more in substance than a general conclusion that the complaint should be dismissed.

The right secured to a party by statute, to have separate findings of fact and conclusions of law inserted by the referee in his report is substantial.

The proper remedy in such a case is not by motion to set aside the report, but the aggrieved party should move to send the case back to the referee to pass specifically upon the material questions of fact and law which he has failed to pass upon, or to resettle his report.

And on such application, it is necessary for the moving party to show to the court what findings he desires to have inserted in the report, and that such findings are material and necessary to a proper review of the judgment. The order sending the case back to the referee must instruct him as to the questions on which he is required to add findings.

It is also incumbent on the moving party to show to the court that he requested the referee at the trial, or before the submission of the cause to him, to specifically find such facts and conclusions of law as he seeks by his motion to have inserted in the report.

Monroe Special Term, January, 1875.

THIS is a motion in behalf of the plaintiffs to set aside the report of the referee by whom the cause was tried, for alleged irregularity in this, that the report does not state the facts found by the referee, nor his conclusions of law.

JAMES C. SMITH, J. — The action is for goods sold and delivered by the plaintiffs to the defendant under a special

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contract, and for freight and express charges on the goods, paid by the plaintiffs at the defendant's request. The answer denies the allegations in the complaint, except the copartnership of the plaintiffs; sets up a counter-claim for damages growing out of the plaintiffs' breach of an alleged agreement to furnish goods of the description mentioned in the complaint, to the defendant to sell for them on commission; and alleges partial payment of the claim set out in the complaint. The counter-claim is replied to.

The findings of the referee, contained in his report are in these words: "I find that the plaintiffs have failed to establish the facts necessary to sustain the complaint. I do therefore find that the defendant is entitled to a judgment dismissing the complaint, with costs."

The motion is made upon the pleadings and report, and an affidavit of the plaintiffs' attorney, which states that at the trial much evidence was given on the issue of the sale and delivery by the plaintiffs to the defendant of the property mentioned in the complaint.

The report is unquestionably insufficient, as it is nothing more, in substance, than a general conclusion that the complaint should be dismissed.

It was said in the case of *Van Slyke agt. Hyatt* (46 N. Y., 259, 263), that the right secured by statute to have separate findings of fact and conclusions of law inserted by the referee in his report is substantial, inasmuch as these findings and conclusions, enable the unsuccessful party to determine whether or not to appeal; and in case he desires to appeal, they are indispensable to enable him to frame and serve his exceptions in due time, and to present the case in proper form for review.

But notwithstanding the insufficiency of the report, the present motion must be denied for several reasons:

1. The proper remedy is not a motion to set aside the report, but the aggrieved party should move to send the case back to the referee to pass specifically upon the material

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questions of fact and law which he has failed to pass upon, or to resettle his report (*Van Slyke* agt. *Hyatt*, *sup.*; *Lefler* agt. *Field*, 50 *Barb.*, 407; *S. C. on appeal*, 47 *N. Y.*, 407; *Morgan* agt. *Mulligan*, 50 *N. Y.*, 665; *Rogers* agt. *Wheeler*, 52 *id.*, 262; *Quincey* agt. *Young*, 53 *id.*, 504; *Meacham* agt. *Burke*, 54 *id.*, 217). An opinion has prevailed to some extent, that under Rule 41, the proper course is to apply to the referee for further findings, at the time of settling the case (*See Excelsior Petroleum Company* agt. *Lacy*, 5 *N. Y. S. C. R.*, 305). But the cases above cited seem to indicate very clearly that such opinion is not entirely correct. The effect of that rule upon the practice was considered and declared by the general term in the fourth department, in the case of *Carroll* agt. *The Staten Island R. R. Company* (65 *Barb.*, 32). It was held in that case, that the provision in Rule 41, that "the judge or referee shall at the time of settling the case or exceptions, find (by the recent amendment, *pass.*) on such other questions of fact as may be required by either party, and may be material to the issue," relates to questions of fact only; and is simply directory, and does not authorize the judge or referee to insert in the case new exceptions, or exceptions not in fact taken. In that action, upon the settlement of the case, the defendant's counsel requested the referee to find in respect to a large number of specified questions of fact, and upon the refusal of the referee to do so, the counsel excepted, and such requests and exceptions were contained in the case. The court held that such exceptions were of no validity, and were not properly before the court, on appeal from the judgment.

Although the specific relief asked for in the notice of motion in the present case can not properly be granted, yet, as the notice asks for "other and further relief," I should be inclined to grant the proper order under the general words, if the case made by the moving party were sufficient in other respects.

2. As I understand the practice, on an application to the court for an order sending the case back to the referee for

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further findings, it is necessary for the moving party to show to the court what findings he desires to have inserted in the report, and that such findings are material and necessary to a proper review of the judgment (*Van Slyke* agt. *Hyatt*, *sup.*; *per* RAPALLO, *J.*, p. 265; *Lefler* agt. *Field*, 47 *N. Y.*, 407). The order sending the case back to the referee must instruct him as to the questions on which he is required to add findings (*Rogers* agt. *Wheeler*, *sup.*; *per* GROVER, *J.*, p. 268). To that end, it is incumbent on the party to set forth distinctly in his moving papers the several findings which he claims should be contained in the report, and also to state consisely, enough of the case to give the court an opportunity to judge of their materiality. In the case now before me, the moving papers do not specify the proposed findings.

3. I think it is also incumbent on the moving party to show to the court that he requested the referee at the trial, or before the submission of the cause to him, to specifically find such facts and conclusions as he seeks by his motion to have inserted in the report (*Lefler* agt. *Field*, in *Ct. of App.*, *sup.*; *Meacham* agt. *Burke*, 54 *N. Y.*, 217; *per* REYNOLDS, *Com.*, p. 220; *Carroll* agt. *The Staten Island R. R. Company*, *sup.*; *per* E. DARWIN SMITH, *J.*, p. 38). Such request is necessary as a foundation for his application to the court. In this respect also, the papers before me are defective.

It may not be inopportune to say here, that the questions of fact upon which a judge or referee may properly be required to pass, are those which relate to material, issuable facts, proper subjects for specific findings, and not those which involve merely collateral circumstances or items of evidence (*Quincey* agt. *Young*, *sup.*; *per* RAPALLO, *J.*, p. 507).

Although the defects above mentioned, prevent the granting of relief in the present motion, yet as an absolute denial might operate unjustly upon the plaintiffs, I think it but just and proper to give them leave to make the proper motion above indicated, at the next special term, and as some of the points of practice involved are not well settled, no costs are given.

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N. Y. SUPERIOR COURT.

WILLIAM P. POWERS agt. PETER J. POWERS, Administrator of the Estate of ANN POWERS, deceased, and THOMAS KIVLIN.

An administratrix no authority to make a gift of a portion of the estate, nor to receive a deed in her own name of any part of the estate.

An administratrix has no right to make a gift to any person of any part of the assets of the estate. Neither will the law give effect to such an illegal alienation.

It is an improper act for an administratrix to sell a portion of the assets of the estate, and in payment take a conveyance of property to herself individually for her own use and benefit and ultimate disposition.

Where the plaintiff, just after reaching his majority, conveyed to his mother, individually, his share in his deceased father's real estate, for the expressed consideration of \$5,000, and took from his mother, as administratrix, a bill of sale of a store of goods, with the good-will of the business, belonging to his father's estate, for the expressed consideration of \$5,000.

Held, that the plaintiff had no discharge for his liability to his father's estate for the store conveyed to him.

Held, also, that the deed to the mother was a distinct transaction and did not operate as a discharge; and consequently there appeared to be a failure of consideration for the deed itself.

Besides, the law scrutinizes carefully all conveyances from a child to a parent. Its policy is to prevent the sacred obligation of filial duty and affection from being perverted to any inequitable and unjust purposes.

Considering all the circumstances under which the conveyance by the plaintiff to the mother was executed, the conclusion arrived at is not one a court of equity should sustain. Conveyance set aside.

Tried at the May Special Term, 1872.

THIS action is brought to set aside a conveyance of certain real estate in the city of New York, made by the plaintiff to his mother Ann Powers, and also a subsequent conveyance

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of the same premises, made by her in her lifetime to the defendant Thomas Kivlin.

Ambrose Monell, for plaintiff.

Frederick Smyth and John McKeon, for defendants.

CURRIE, J. — William P. Powers, Sr., the father of the plaintiff, died on the 25th day of June, 1866, intestate, leaving Ann Powers his widow and William P. Powers the plaintiff, Peter J. Powers, and Margaret Powers his children and only heirs at law. The deceased at the time of his death owned personal and real estate, the latter being in this city. Upon his decease each of the children became entitled to an undivided third part of the real estate, subject to the dower of the widow, their mother, Ann Powers. At this time the plaintiff was nearly twenty years of age, the daughter Margaret about sixteen years of age, and the son Peter had arrived at his majority.

On the 31st day of August, 1867, the plaintiff executed a deed to his mother Ann Powers, of his undivided one-third of the real estate which had belonged to his father and which was recorded September 11th, 1867. The plaintiff became twenty-one years of age on the twenty-fifth day of July preceding the execution of this conveyance, which is one of those which he seeks by this suit to set aside. The consideration named in the deed is the sum of \$5,000. The plaintiff was married on the 15th of September, 1867.

The defendant Thomas Kivlin, married the daughter Margaret November 3d, 1867, and she died without issue November 7th, 1871.

The mother, Ann Powers, on the 11th day of July, 1868, conveyed to the defendant Thomas Kivlin, the interest which had been conveyed to her by the plaintiff in the real estate left by her husband, and also other interest for the consideration as expressed in the deed of \$2,000 which deed was

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recorded October 7th, 1869. The son, Peter J. Powers, on the 30th of July, 1867, conveyed to his mother, Ann Powers, his undivided third part of the real estate left by his father, and which was also embraced in the deed by her to the defendant Thomas Kivlin.

On the 11th of July, 1868, Margaret Kivlin conveyed her undivided third part of the real estate left by her father to one Thomas Kenny, for the consideration as expressed in the deed of the sum of \$10,000, and her mother, Ann Powers, executed a release of her dower for the consideration of one dollar.

On the same day Thomas Kenny conveyed the premises to the defendant Thomas Kivlin, for the like consideration of \$10,000 as expressed in the deed. Both of these deeds and the release of dower were recorded October 7th, 1869.

Ann Powers, the mother, died April 17th, 1872, after the commencement of this action in which she was one of the defendants, and which, since her death, has been continued against her administrator the son Peter J. Powers.

By the deeds, the real estate of which the father of the plaintiff died seized, has been conveyed to the defendant Thomas Kivlin.

Wm. P. Powers, Sr., the father of the plaintiff, at the time of his death, and for many years previous had kept a liquor store in Chambers street. He resided with his family over the store. Some ten years before his decease, he took the defendant Thomas Kivlin, into his house when disabled by an accident, had him cared for, and from that time forward as long as he lived, he kept the defendant Thomas Kivlin in his house, treated him as a member of his family, received no pay for his board and lodging, and it appears that the most intimate and confidential relations existed between them.

The mother of the plaintiff, Ann Powers, was an industrious woman, with few acquaintances, seldom leaving her house except when called by religious or domestic duties, and unable to read or write.

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The defendant Thomas Kivlin, continued to remain in the family after the decease of her husband. Friendly and confidential relations between him and all the other members of the family had always existed prior to that event, and continued to do so until after the execution of the deed by the plaintiff to his mother. She became the administratrix of her husband's estate, but the business was transacted and the checks drawn by the defendant Thomas Kivlin, who had in the mean time been elected, and was then discharging the duties of a civil justice.

The plaintiff was employed by his mother to attend to the bar, and carry on the business at the liquor store. He continued so employed up to the time he executed the deed to her.

No inventory was made of the personal estate, and very little light is thrown upon its amount or nature. The deceased appeared to owe no debts of any consequence. The balance at that time to his credit in the Chemical Bank was \$10,267.31. The good-will, lease and stock in his liquor store, appears to have been worth at that time about \$5,000 or nearly that.

The real estate left by deceased, was worth, at the time the plaintiff conveyed his share to his mother, from \$30,000 to \$35,000, and the portion that was improved rented for about \$2,450 per annum.

The day after he so conveyed his share to his mother, she, by a bill of sale of that date, September 1st, 1867, executed by her as administratrix of her husband's estate, and so describing herself, conveyed to him "The stock, fixtures, bar and gas fixtures" of the liquor store in Chambers street, and the lease and good-will of the business. There is no sum specified in the bill of sale as the consideration for the same. The defendant Thomas Kivlin, was the subscribing witness to it, and also took the acknowledgment of the deed from plaintiff to his mother as a justice. About two weeks after the marriage of the plaintiff, to which his mother was opposed, she together with her son Peter, and her daughter Margaret,

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and the defendant Thomas Kivlin, removed from the premises in Chambers street. This was at the end of September, 1867. Thomas Kivlin, soon after purchased a house in Oliver street, and Mrs. Powers and her daughter, as long as they lived, resided with him, and the son, Peter, still continues to do so.

The plaintiff brought his wife to reside in the Chambers street premises, and at that time there was an altercation between him and the other members of the family, and he had very little intercourse with them after that.

The plaintiff, after the death of his father, manifested very little business capacity. The business of the place was indifferently conducted and declined. He was reckless, without much experience, very young for the responsibilities and temptations of the position, and addicted to the excessive use of liquor. As to the plaintiff's habits in this last respect there is some conflict of testimony, but I can come to no other conclusion from the evidence, than what I have specified.

The plaintiff testifies that he was intoxicated when he signed the deed to his mother, and unconscious of the effect of the instrument, and that he did not discover that he had conveyed away his share of his father's real estate until about the 1st of June, 1870, when his counsel discovered such a conveyance on record. The plaintiff and Thomas Kivlin the defendant, are the only survivors of those who were present at the execution of the instrument. Their testimony is very conflicting.

The plaintiff testifies that the defendant Kivlin, came into the bar-room, where plaintiff and six or seven others were drinking, and as he was going up stairs to his supper, said "I want you up stairs," that he accompanied him up stairs where his mother was sitting, and the defendant said to him "I have got a paper I want you to sign," and he pulled it out of his inside coat pocket and said "sign this." That he said "Is it all right," and the defendant said "yes," and he signed it. That he never read the paper; that it was not explained to him; that he never received a dollar consideration for it, and

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never knew until June, 1870, that he had executed a deed, and that he was intoxicated at the time he signed it.

The defendant Kivlin testifies that previous to the execution of the deed, there were frequent conversations between the mother, the three children and himself, as to the boys getting their shares of the property, and that the plaintiff was to take the store for his share at \$5,000. That at the request of plaintiff's mother, he had the deed prepared. That while he was at supper, plaintiff came up and asked him if he had the deed. He told him he had, and handed it to him. Plaintiff read it all over and said "Kivlin, if I sign this, I have no more claim have I," and he replied to him "no you have not, no more claim except your mother likes to give you anything." He also states that the plaintiff said to his mother "that this deed conveyed to her, his share in his father's property," and she replied if it conveyed ten times as much, she had a right to it. He also states, that the plaintiff executed the deed at this interview, that he had not the slightest appearance of liquor at that time, and that his sister Margaret was present.

On the part of the defendants it is claimed, that the bill of sale of the store, executed on the day after, by the mother as administratrix to the plaintiff, was in reality, the way in which the consideration of \$5,000 expressed in the deed, was paid by the mother to the plaintiff.

He, on the other hand, insists that it was a gift to him, from his mother. These transfers seem to have been made, without the presence or advice of counsel, or of parties outside of those present at the execution of them.

An administratrix has no right to make a gift to any person, of any part of the assets, and especially of the magnitude and value of this store. Neither will the law give effect to such an illegal alienation. On the other hand, it is an improper act for an administratrix to sell a portion of the assets, and in payment take a conveyance of property to herself individually, for her own use and benefit and ultimate

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disposition. The law does not give effect to such an illegal appropriation. The effect of those transactions is, that the plaintiff is still indebted to his father's estate for the value of the property conveyed to him by the bill of sale, and the mother received a conveyance to herself individually, of the plaintiff's share in his father's real estate, without the payment of any consideration by her to him for it. The plaintiff has no discharge for his liability to his father's estate for the store conveyed to him.

The deed to the mother is a distinct transaction, and does not operate as a discharge. There consequently appears to be a failure of consideration for the deed itself.

But, in addition to this, another difficulty arises, as to giving effect to the deed from the plaintiff to his mother. The law scrutinizes carefully all conveyances from a child to a parent. Its policy is to prevent the sacred obligations of filial duty and affection from being perverted to any inequitable or unjust purpose. The courts in this country have not gone as far as they have in England to establish any presumption of law against the validity of such transfers, but they will not sustain such a transaction, where it appears that any advantage has been taken of the inexperience of the child, or of the confidence naturally reposed by a child in the suggestions, advice and judgment of a parent.

In the case of *Bury* agt. *Oppenheim* (26 *Beavan*, 594), the gift of a daughter to her father immediately after she came of age was set aside, and it was held that the father was a trustee for the daughter and bound to repay it. In *Slocum* agt. *Marshall* (2 *Wash. C. C.*, 397), where a daughter conveyed real estate to her father immediately before her marriage, under a belief that she would be benefited by the same, and that the property would become hers after the decease of her father, and where the operation of the conveyance was to deprive the daughter of the estate, a reconveyance was declared. In *Carpenter* agt. *Heriot* (1 *Edw.*, 338), a bond by a son to his father on coming of age for a larger

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amount than the sum advanced to the son during infancy was set aside. Also in *Baker agt. Bradley* (7 *De Ges, McNaughton & Gordon*, 597), a mortgage made by father and son to secure the debt of the father, the son having no separate advice was set aside.

In *Wright agt. Vanderplank* (1 *Jurist [N. S.]*, 932), where a parent was in possession receiving the rents, and the daughter executed a deed to him on her coming of age which was prepared by his solicitor it was set aside. In *Wallace agt. Wallace* (2 *Drury & Walsh*, 470), it was held that where there were no circumstances calling upon the son to give up anything to the parent, no younger children to provide for, it was a case of oppression. In *Archer agt. Hudson* (7 *Beavan*, 557), it was held that in cases of a conveyance by a child to a parent, courts of equity will see that the child is placed in such a position as will enable it to form an entirely free and unfettered judgment, independent altogether of any sort of control. In *Hoghton agt. Hoghton* (15 *Beavan*, 278), it was held, that where the parent takes direct benefits from a son, the property must be resettled in a proper and reasonable mode and with regard to the interests of the family, and that the son should have the benefit of professional assistance and advice secured to him. In *Young agt. Peachy* (2 *Atkyn.*, 254), a conveyance obtained from a child for one particular purpose, and then applied to another, was relieved against. Viewed in the light of these decisions the question arises, how we are to regard the present case? The plaintiff at the time he executed the conveyance, was inexperienced in transactions of that character. He had shown no business capacity or maturity of judgment; but, on the contrary, had neglected and mismanaged the store. He was addicted to intemperance, had arrived at age only the twenty-fifth day of the preceding month, and was then soon to be married. He had no legal aid or advice respecting the step he was about to take. His father, it is shown, was a man of generous impulses, and warm attachments, and had many friends of sagacity,

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experience and ability to advise, and who would willingly have advised his son, but no one was consulted outside of the household. His mother, and the defendant Kivlin, possessed his entire confidence. The latter had been for ten years a friend and inmate of the family, the adviser of his mother, and in whom, the evidence shows, they all placed the most implicit confidence. He was a man who during that period and upwards, had held responsible and honorable public positions, and previous to that, had had a business experience of several years, and who from his maturity and judgment, might be reasonably considered worthy of such confidence. In this transaction he appears to have been the intelligent and moving party. He procured the deed, the presence of the plaintiff, and produced it for execution. The mother, though she could neither read or write, and had led a confined domestic life, seems to have had a strong will and determination that the plaintiff should execute the deed. When he told her, as the defendant Kivlin testifies, "that this deed conveyed to her his share in his father's property," she said "if it conveyed ten times as much she had a right to it." This would indicate that no ordinary pressure was brought to bear upon him by his mother to procure the conveyance. There is nothing in the evidence that justifies the assertion of such a right by the mother.

The plaintiff says that the sister Margaret was not present, the defendant Kivlin contradicts him. She was an inexperienced girl, but a few weeks from the convent, where she was being educated, and there in the presence of the defendant, who in a short time was to become her husband, had little capacity to advise the plaintiff, even if she had felt an inclination to do so. The mother during her lifetime, continued to collect the rents of the property, though she conveyed it to the defendant Thomas Kivlin, in July following the execution of the deed to her. The consideration of \$2,000 mentioned in that deed, is a grossly inadequate consideration, being but a little more in amount than the one year's rent

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accruing upon the two shares conveyed. This is also more apparent, when the deed of the share of the sister is referred to, and which expresses a consideration of \$10,000. Ought a court of equity to uphold an act by which a child is, as in this case, divested of his patrimony, by the action of a parent and a most trusted and confidential friend for their benefit, and without adequate or legal consideration for the transfer? I have failed to find any decisions tending to support the position of the defendant.

Considering all the circumstances under which the conveyance by the plaintiff to the mother was executed, I am led to the conclusion that it is not one, that a court of equity should sustain. Nor do I see, that the defendant Thomas Kivlin, stands in any different position than the mother, Ann Powers. He had notice of all the circumstances attending the conveyance to her. He was one of the principal actors in the transaction. He paid but little for the deed of the property to himself, if he paid the consideration expressed in the deed, and he alone appears to have derived any very substantial advantage from the conveyance by the plaintiff to his mother.

It may be, that he holds this estate, to protect it for the sons of his benefactor, until such time as he deems they may better care for it, and that motive may have guided him in his course, in respect to it. But the law is averse to secret and unwritten trusts, and in reference to transactions like the present, whatever may be the motives and designs of those who thus become the beneficial recipients, classes them at the best, as constructively fraudulent.

Entertaining these views in regard to the conveyances from the plaintiff to his mother, and by her to the defendant Thomas Kivlin, I think they should be set aside as against the plaintiff, and that he should have the relief prayed for in the complaint.

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COURT OF APPEALS.

MARY BANLEC, Administratrix, &c., appellant, agt. THE NEW YORK AND HARLEM RAILROAD COMPANY, respondent.

What is necessary to constitute negligence and want of care in the selection and employment by a railroad company of their agents and employes, to render the company liable in cases of personal injury.

It is now an established and well settled doctrine that if a master is wanting in proper care in the selection of servants, and negligently or knowingly employs or retains in his service those who are incompetent and unfit for the duties to which they are assigned, he is liable to respond to other employes and servants engaged in the same service, who may sustain damages by reason of such incompetence and unfitness.

It is likewise settled that when the master is a corporation, necessarily acting by and through agents, the acts of its general agents, charged with the employment and discharge of servants in the performance of that duty, must be regarded as its acts.

And it is also well settled that when reasonable precautions and efforts to procure safe and skillful servants are used, and without fault one is employed through whose incompetency damage occurs to a fellow-servant, the master is not liable.

When, as in this case, the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence, with proof that the principal had knowledge of such acts.

But proof of specific acts of negligence of a servant or agent on one or more occasions does not tend to prove negligence on the particular occasion which is the subject of inquiry.

It is the duty of a railroad corporation to exercise due, that is, ordinary care, in the selection and employment of its servants and agents, having respect to their particular duties and responsibilities, and the consequence that may result from the want of competence, skill or care in the performance of their duties.

An individual who, by years of faithful service as an employe, has shown himself trustworthy, vigilant and competent, is not disqualified for further employment, and proved either incompetent or careless, and not

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trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind.

The verdict of a jury against a railroad corporation for negligence, based upon insufficient evidence, would be against evidence, and in such case it is the duty of the court to nonsuit.

Esek Cowen, for appellant.

Elliott F. Shepard, for respondent.

ALLEN, J.— But a single question is presented by the record before us in this action. It is conceded — or if not conceded it must be regarded as too firmly established, as well upon principle as by authority, to be now questioned — that if a master is wanting in proper care in the selection of servants, and negligently or knowingly employs or retains in his service those who are incompetent and unfit for the duties to which they are assigned, he is liable to respond to other employes and servants engaged in the same service who may sustain damage by reason of such incompetence and unfitness; and when the master is a corporation, necessarily acting by and through agents, the acts of its general agents, charged with the employment and discharge of servants in the performance of that duty, must be regarded as its acts. The corporation should be regarded as constructively present in all acts performed by its general agents within the scope and range of their ordinary employment. It is equally well settled that when reasonable precautions and efforts to procure safe and skillful servants are used, and without fault one is employed through whose incompetency damage occurs to a fellow-servant, the master is not liable (*Laning agt. N. Y. C. R. R. Co.*, 49 *N. Y.*, 521; *Flike agt. B. & A. R. R. Co.*, 53 *id.*, 549; *Wright agt. N. Y. C. R. R. Co.*, 25 *id.*, 562; *Tarrant agt. Webb*, 18 *C. B.*, 797; *Armond agt. Holland, Ellis, Bl. & Ellis*, 102).

There is nothing in the case to justify the imputation of want of care in the first or original employment of McGerty, the switchman, by whose want of care and neglect of duty,

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as is charged, the injury was occasioned to the deceased, resulting in his death. The complaint is, that he was retained in the service of the defendant, and in the same capacity as a switchman, after he had shown himself unfitted for the position, and unsafe to be trusted in it. Proof was given of a single occurrence in respect to which it was claimed an accident, similar to that which resulted in the death of the deceased, was occasioned by his negligence and carelessness, and that knowledge of the facts was brought home to the general agents of the defendant. When, as here, the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant, on specific occasions, may be given in evidence, with proof that the principal had knowledge of such acts. The cases in which evidence of other acts of misconduct or neglect of servants or employes whose acts and omissions of duty are the subject of investigation have been held incompetent, have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion, by showing similar acts of negligence on other occasions. This class of cases have no bearing upon the case in hand, and may be laid out of view. Proof of specific acts of negligence of a servant or agent, on one or more occasions, does not tend to prove negligence on the particular occasion which is the subject of inquiry. When character, as distinguished from reputation, is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation or want of adaptation to any position, or fitness or unfitness for a particular duty or trust. It is by many or by a series of acts that individuals acquire a general reputation, and by which their characters are known and described, and the actual qualities, the true characteristics of individuals, those qualities and characteristics which would or should influence and control in the selection of agents for positions of trust or responsibility, are learned and known. A principal would be without excuse should he employ for a responsible position, on the proper

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performance of the duties of which the lives or persons of others might depend, one known to him as having the reputation of being an intemperate, imprudent, indolent or careless man. He would be held liable to the fellow-servants of the employe for any injury resulting from the deficiencies and defects imputed to the individual by public opinion and general report. Still more should he be chargeable if he had knowledge of specific acts showing that he possessed characteristics incompatible with the duties assigned him, and which might expose his fellow-servants and others to peril and harm. *Frazier* agt. *Pennsylvania Railroad Company* (38 *Penn. St. R.*, 104) is adverse to these views. There, evidence was admitted, over the objection of the defendant, of repeated acts of negligence of the conductor, by whose carelessness the plaintiff, a brakeman on the train, was injured, resulting in collisions before the time of the injury to the plaintiff, for which the conductor had been fined by the company, and that the agents of the defendants knew these facts, and it was held error. The court, while conceding that character grows out of special acts, held that it could not be proved by them, and the case was classed with those in which character is proved by way of impeachment, and in which it would be impossible to investigate specific acts, and in which general reputation alone can be given in evidence. It is safe to say that this decision has not been received with approval by the profession (*Whurton on Negligence*, sec. 238 and notes). It is reviewed in *Pittsburg, Fort Wayne & Chicago Railroad Company* agt. *Risley* (38 *Indiana Rep.*, 294), in a very satisfactory opinion by BUSKIREK, J. The court, in that case, was of the opinion, and so held what I think the most reasonable doctrine, that for the purpose of showing that the officers of a railroad corporation did not exercise due care, prudence and caution in the employment of, or in retaining in service, careful, prudent and skillful persons to manage and operate its road, and for the purpose of charging such corporation with notice of the incompetency of its employes' specific acts of

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negligence, or unskillfulness of such employes, may be proved. In the case cited, the conductor, through whose "gross negligence, carelessness and want of attention" in leaving a switch unadjusted, and thereby causing a collision and consequent injury to the plaintiff, was proved to have, about a year before, carelessly and negligently left a switch open, by which a train was thrown from the track, and a short time before the injury to the plaintiff, and the same fall, to have been "guilty of gross negligence" in disobeying orders to wait at a certain station for a train passing east, and in signaling the engine to go on after he had ordered down brakes, from which facts and circumstances the jury found that the conductor was a careless and unfit person for that position. The court merely remarked as to the effect to be given to the evidence impeaching the qualifications of the conductor, in response to the contention of counsel, that the verdict was not sustained by evidence, that they were satisfied that the verdict was sustained. The case had been twice tried, each time resulting in a verdict for the plaintiff, and the court declined to disturb the last verdict.

The duty of a railroad corporation is to exercise due, that is, ordinary care, in the selection and employment of its servants and agents having respect to their particular duties and responsibilities, and the consequences that may result from the want of competence, skill or care, in the performance of their duties. If, without exercising such care and caution, employes and agents are selected, who are incompetent, or in any respect unfitted for the position, and harm and loss come to others by reason of such incompetency or unfitness, the corporation must answer for their neglect and want of care in employing a servant incompetent or untrustworthy.

There is no impeachment, or attempt to impeach, the qualifications and fitness of McGerty as a switchman, except by the proof of a single occurrence several months before the occurrence in question. It is not contended that the defendant was wanting in the exercise of due care in his original

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employment, and it must be assumed that he was competent when employed, and reasonably intelligent, and was during all the time he was in the service of the defendant, sober, temperate, attentive to his duties, carefully, intelligently and successfully performing the service required of him, with the single exception referred to. At the time of the accident he had been in the service of the defendant in different capacities for eight or nine years; had served as a switchman over a year and a half at or near the point at which the plaintiff's intestate was injured. Six or seven months before the time last referred to, a train had been thrown from the track by a misplaced switch, while McGerty was in charge, which the plaintiff claims was caused by his carelessness, want of attention or mistake. If it be conceded that the negligence of McGerty upon the prior occasion is established, it by no means follows that the defendant was bound to discharge him upon peril of being charged with neglect and a want of due care in retaining him in its service. An individual who, by years of faithful service, has shown himself trustworthy, vigilant and competent, is not disqualified for further employment, and proved either incompetent or careless, and not trustworthy, by a single mistake, or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness, or error of judgment. This must be the case as to all employes of corporations, until a race of servants can be found free from the defects and infirmities of humanity. A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust, or any particular service, as when such act is intentional, and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor, and his inability to perform a particular service. But a single act of casual neglect does

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not, *per se*, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed, and qualities exhibited, by a series of acts, and not by a single act. An engineer might, from inattention, omit to sound the whistle or ring the bell at a road crossing, but such fact would not tend to prove him a careless and negligent servant of the company. The company is only charged with the duty of employing those who have acquired a good character in respect to the qualifications called for by the particular service, and no one would say that good character acquired by long service, was destroyed or seriously impaired by a single involuntary and unintentional fault (*Murphy agt. Pollock*, 15 *Inst. Com. Law*, 224). But this does not necessarily depend upon the correctness of this view of the effect to be given to a single instance of neglect. All that the corporation defendant was bound to do, after the occurrence, was to inquire into it and ascertain the facts, and act in the discharge or retention of the switchman, with reference to the facts as ascertained, as reasonable prudence and care should dictate; and if such care and caution was exercised, the company is not liable, although its general agent erred in judgment in retaining the switchman in the same service. Ordinary care and a reasonable exercise of discretion and judgment is all that is necessary to absolve the corporation from the charge of neglect of duty in such a case.

The transaction upon which stress is laid and by force of which it is now sought to charge the defendant with the consequences of the servant's neglect on this occasion, and the agency of the switchman in causing the accident on that occasion, was investigated immediately thereafter by the agent of the defendant, whose general duties included such investigation, and who was authorized to employ and discharge switchmen at that point. He had the statement of the switchman himself, and in this record we have his sworn statement of the same transaction, and assuming, as we must, that the facts disclosed upon this trial were made known to the

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agent and representative of the defendant, then it was certainly a question of doubt whether the fault of that accident was upon the switchman or the engineer in charge of the train that was thrown from the track. There is no evidence that he rang the bell or gave other signal of the approach of his train, as he was bound to do by the rules of the road and of the service upon a train going south on the New Haven track. The switchman heard no signal, and only hearing of the near approach of the train by the noise made by the running of the train, he might reasonably, in the hurry and haste incident to the occasion, have supposed that it was an extra upon the Harlem track, which did not signal when going south, and thus be innocently led into the mistake causing the accident. The corporation might well come to the conclusion that the misplacing of the switch on that occasion was not a negligent or careless act on the part of the switch tender; and if a reasonable man might infer that the switchman was careless or acted unadvisedly and without proper caution, it does not follow that general carelessness and imprudence can be inferred from this single act in a man as to whose conduct on other occasions there could be no imputation of negligence or inattention, or that a want of reasonable care could be inferred on the part of the corporation in retaining him.

To justify a recovery by the plaintiff from this single instance, there must be inferred not only the carelessness as a characteristic of the switchman and his consequent unfitness for that particular service, but the want of due care in the corporation in investigating the occurrence and determining upon the retention of the man. The corporation did not guarantee the absolute fitness of their servants and agents for their respective employments, and is only responsible for some fault in employing or continuing them in its service. The question in this case was, whether the single occurrence detailed by the witness, in connection with other circumstances and with his general character and conduct, was such as to make it necessary for the defendant in the exercise of proper

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care and prudence, such as the law enjoins, to discharge this switchman. I am clearly of opinion that there was not sufficient evidence to carry the case to the jury. A verdict against the defendant, based upon this evidence, would have been against evidence, and, such being the case, it was the duty of the court to nonsuit. This case, as reported upon a former trial (5 *Lansing*, 436), and the decision there made is quoted with apparent approval by Mr. Wharton in his recent treatise on the law of negligence, and the principle there decided makes a part of the text of section 238 of that work. It is not enough to authorize the submission of a question, as one of fact, to a jury, that there is "some evidence, a scintilla of evidence, or a mere surmise, that there may have been negligence on the part of the defendants, would not justify the judge in leaving the case to the jury" (*Per WILLIAMS, J., Toomey agt. Railway Co.*, 3 *C. B. [N. S.]*, 146). The same learned justice adds that every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. In another case it is held that a judge will not be justified in leaving the case to the jury when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant. In such case the party affirming negligence has altogether failed to establish it, and EARLE, C. J., says: "That is a rule which ought never to be lost sight of" (*Cotton agt. Ward*, 8 *C. B. [N. S.]*, 568). This rule applied to this case leads to an affirmance of the judgment, for it cannot, it seems to me, be denied that the evidence is as consistent with the idea that the defendant did carefully investigate the occurrence of which evidence was given and with proper prudence, and in the exercise of due care continue McGerty in its employ, as that they were negligent in the performance of that duty, and carelessly or imprudently retained him with knowledge that he was not a proper man for the position. At most the jury could only conjecture that the defendant might have been

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wanting in the care and caution proper to be exercised in such a case, and if so the case was properly withheld from the jury (*Avery* agt. *Boundred*, 6 *E. & B.*, 973; 4 *McMahon* agt. *Lenard*, 6 *H. of L. Cases*, 970, 993).

I am of the opinion that the plaintiff was rightfully non-suited, and that the judgment should be affirmed.

All concur, except FOLGER, J., not voting.

Delcomyn agt. Chamberlain.

NEW YORK SUPERIOR COURT.

FRANZ DELOOMYN agt. JOHN C. CHAMBERLAIN.

Taxation of costs.

It is the duty of the clerk of the court, under section 811 of the Code, in the taxation of costs, to examine the charges for disbursements, and to disallow all which, in his judgment, are unreasonable or have been unnecessarily incurred.

Where the plaintiff, a resident of London, applied at special term for a commission to take his testimony, on his own behalf, by commissioners appointed in London, without any provision in the order granted for the expense of the commission, and on the trial the plaintiff recovered a judgment, and the clerk, on taxation of the costs, as a part of the plaintiff's disbursements, allowed the commissioners' fees, amounting to nearly \$500,

Held, on appeal from this taxation, that it would be improper to charge the defendant with an expense incurred by his adversary, for his own benefit and convenience, and which was incurred under no compulsion of law.

It was competent for the plaintiff to have appeared at the trial and be examined on his own behalf. But if he had so attended he could not have been allowed fees as a witness. He would have had to go to his residence and return and be present at his own expense.

Special Term, February, 1875.

APPEAL from a taxation of costs.

The plaintiff, a resident of London, for the purpose of testifying in his own behalf, applied to the special term for a commission, appointing commissioners in London, to take his deposition upon interrogatories.

The motion was granted; an order in the common form was entered, and a commission, with interrogatories and cross-interrogatories, was sent to London.

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No provision was made in the order for the expense of the commission.

It was duly executed and returned, and used on the trial.

The plaintiff recovered a judgment, and the clerk, as a part of the plaintiff's disbursements, allowed the commissioners' fees, amounting to nearly \$500.

Mr. Edsall and Mr. Dunning, for defendant.

Mr. Lord, for plaintiff.

MONELL, *C. J.*—The power to take the testimony of a witness residing out of the jurisdiction of the court is derived wholly from the statute (2 *R. S.*, 393, *sec.* 11). There is no common-law right (*McCall agt. Sun Mut. Ins. Co.*, 34 *Superior Ct. R.*, 310; *affirmed*, 50 *N. Y. R.*, 332).

Under the statute, the court may award the commission "upon such terms as it shall think proper."

In this case it would have been competent for the court, in the order awarding the commission, to have provided that, as the examination was wholly for the plaintiff's benefit, the commission should be executed at his expense. But there is no such provision in the order, and it was insisted that it was too late now to object.

The clerk is directed, upon the application of the prevailing party, to insert in the entry of judgment the costs and "necessary disbursements, * * * * including the reasonable compensation of commissioners in taking depositions." The disbursements must be stated in detail, and verified by affidavit (*Code*, *sec.* 311).

It is the duty of the clerk to examine the charges, and to disallow all which, in his judgment, are unreasonable or have been unnecessarily incurred.

The proper place, therefore, to object is before the taxing officer, although a more convenient practice would be to settle the question in the order granting the commission, when the court can impose such terms as may be proper.

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The only objection which can be taken now is, that the commissioners' fees or charges were not a necessary disbursement.

The provision allowing the examination of a party as a witness on his own behalf, on commission, "in the same manner and subject to the same rules of examination as any other witness" (*Code, sec. 399*), does not place a party in the same condition of any other witness in anything more than the mode of obtaining a commission and the form of executing it. The same section also allows the examination at the trial; and it was long since settled that a party attending the trial as a witness, and being examined in his own behalf, could not be allowed witnesses' fees (*Steers agt. Miller, 28 How. Pr. R., 266; affirmed, Court of Appeals, 30 id., 7*).

A necessary disbursement is such as a party is compelled to make or incur, incident to the regular proceedings in the action, and to bring it to trial according to the course and practice of the courts. He has the right to obtain the proper evidence to sustain his case, and to use the means provided by law to secure it. He has neither legal or physical power over his witnesses, but must use the power given to the courts to obtain their attendance; and as they are entitled to certain fees for their attendance, he must pay them.

The compulsion, therefore, which rests upon a party to pay fees to officers of the court, and to witnesses, commissioners, referee, &c., which the law requires him to pay, in the progress of his action to trial and judgment, renders such payments necessary. They cannot be avoided, and are part of the burdens which rest upon litigants.

But being paid under a legal compulsion, and thereby made necessary, they may be properly included in the judgment.

When, however, no such compulsion exists, and the law does not require the fee to be paid as a means of obtaining the service, and the payment is voluntarily made or incurred, it cannot be claimed to have been necessarily paid.

In this case, it was competent for the plaintiff to have appeared at the trial and be examined on his own behalf.

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But, as we have seen, had he so attended he could not have been allowed fees as a witness. He would have had to go and return and be present at his own expense. Instead of attending the trial, he availed himself of the provision of law which allowed his deposition to be taken through commissioners. This substitute for his attendance on the trial was wholly for his own convenience, and possibly to save the time and expense of a journey from London to this city. But had he made the journey he could not have been allowed for the time consumed nor for the expense incurred.

It was not necessary to take the plaintiff's deposition. Over an ordinary witness residing out of the jurisdiction of the court, neither a party nor the court has any power, and his attendance on the trial cannot be compelled. In that case it is a necessity to take his deposition.

But a party has power over himself, and the necessity of a commission does not exist. He can go to the trial. It needs but his own volition, and cannot require the process of the court to secure his attendance. If for any reason he avails himself of a commission, there is no more propriety in allowing him to charge the expenses upon his adversary than if he attended the trial, to charge witnesses' fees.

The cases are parallel.

The necessity of a disbursement depends upon whether a party must pay or incur it. If the law does not require its payment, and it is merely for the convenience of the party, it cannot be said to be necessary.

In *Goodyear agt. Baird* (11 *How. Pr. R.*, 377), a jury fee was disallowed as unnecessary in an inquest, the defendant failing to appear.

In *Haynes agt. Mosher* (15 *id.*, 216), a surveyor's fee was not allowed, as it was not a disbursement in the action, although necessary to enable the surveyor to testify.

In *Pike agt. Nash* (16 *id.*, 53), witnesses' fees attending the circuit, at which the cause was referred, were disallowed

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as not necessary, the party knowing that according to the ordinary practice of the court the action would be referred.

In *Case* agt. *Price* (17 *id.*, 348), the charge of two dollars for each additional defendant was stricken out, for the reason that the defendants were not necessary parties.

And in *Hamilton* agt. *Buller* (30 *id.*, 36), a sum paid for a copy of the stenographer's notes, used on a second trial, was disallowed. The court says: "These notes, although very useful, were not necessary disbursements. Any other notes would have answered the same purpose."

This is a new question, but I am satisfied that it would be improper to charge the defendant with an expense incurred by his adversary for his own benefit and convenience, and which was incurred under no compulsion of law.

There are many expenses incurred during the progress of an action which are not chargeable upon the unsuccessful party; and the provision authorizing an extra allowance was doubtless designed to cover, in some measure, the extra outlay where the taxable costs do not sufficiently indemnify for the labor of counsel, and the necessary and reasonable expenses of the successful party (*Burke* agt. *Candee*, 63 *Barb. R.*, 552).

There must be a retaxation and a disallowance of the commissioners' fees on the plaintiff's commission.

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SUPREME COURT.

THE TRUSTEES OF THE REFORMED PROTESTANT DUTCH CHURCH
OF ROCHESTER agt. EUGENE HARDENBERGH.

Subscription to the building of a church.

A subscription for the purpose of building or repairing a church in the following form, to wit: "We, the undersigned, do hereby, for value received, promise to pay to the consistory of the Reformed Protestant Dutch Church, of the town of Rochester, the several sums set opposite our respective names, for the purpose of paying off the indebtedness of said church, on condition that the sum of \$5,000 be subscribed therefor," expresses a sufficient and valid consideration; and where the condition has been complied with, becomes a binding obligation at law upon each subscriber.

Argued and decided at the General Term of the Third Department, in June, 1874, MILLER, BOCKES and BOARDMAN, Justices. Judgment affirmed. No opinion written.

THIS action comes up to be heard in the first instance at the general term on a case and exceptions. A verdict was rendered for the plaintiff at the Ulster circuit, in January, 1873, judge DANFORTH presiding, and judgment has been entered as security.

The facts, which were proven on the trial, are as follows: That the plaintiff is a duly incorporated religious society under the statutes of this state; that the defendant is a member of said society, and a communicant of the church. The society owned a church and a parsonage house and farm. Repairs being needed to the church and parsonage, a committee was appointed to make them, consisting of the defendant and two others, but the defendant was the acting committee.

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A debt was contracted in making these repairs amounting to about \$10,000, part of which was paid by a sale of church lands, and the church undertook to raise the residue by subscription. A resolution for that purpose was passed, and a committee appointed to procure the subscriptions. A book was prepared for these subscriptions, with the following heading:

"We, the undersigned, do hereby, for value received, promise to pay to the consistory of the Reformed Protestant Dutch Church of the town of Rochester, the several sums set opposite our respective names, for the purpose of paying off the indebtedness of said church, on condition that the sum of \$5,000 be subscribed therefor."

The committee called on the defendant at the outset of the subscription, and he promised to subscribe \$500. They then subscribed themselves, and went through the congregation and procured within \$500 of the amount required to be raised. They then called on the defendant again and asked him to subscribe the \$500, as he had promised. He said he would not do that, but would subscribe \$250, and did so. He said he would pay that.

The committee then continued to procure further subscriptions, until the amount reached \$5,190. They spent two or three months in this business.

The subscription book was put in evidence and shows an aggregate of \$5,190. The same book contains the credits for payments by the subscribers, which was also put in evidence, but by an error in printing was omitted and appears at the end of the case.

The court, under a captions objection by the defendant, required the plaintiff to give proof of the actual signing of the subscription. This was rendered difficult by the fact that the principal man of the committee, who was also treasurer of the society, had died after the suit was commenced. To overcome this difficulty, the plaintiff proved the fact that he was treasurer, that he kept an account of the moneys collected

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and received, and his entries of the amounts received, which corresponded with the subscriptions. The witness who testified to this made many of the collections himself.

The proof showed that there were only two subscriptions that were not proved, either by actual proof of the signing, or proof of the handwriting, or the payment by the subscriber, viz.: George Roper, five dollars, and Jeremiah Schoonmaker, twenty-five dollars; total, thirty dollars. For all the others, except the defendant, the church had either received the money or had taken notes and was receiving the interest.

The actual moneys received amounted to \$4,986.92, which includes some interest; and the proof also shows that the church had paid out \$4,966.62.

Upon this evidence the case was submitted to the jury, upon the question whether the plaintiff had complied with the condition of the subscription, by procuring the requisite amount to be subscribed, and the jury found for the plaintiff.

The principal defense was that the contract was without consideration and void.

The defendant also objected to showing compliance with the condition in the contract by proof of actual payment of the subscriptions.

The exceptions relate entirely to these two points.

The court held that the agreement was valid on these grounds:

1. The consideration expressed in the instrument itself being "for value received," which value was shown to be the improvement of the property of the society of which he was a member, and which improvements he had requested and directed himself.

2. The implied request contained in the subscription, that the trustees should raise the fund to pay the debt of the society, and the labor performed and trouble and expense to which the trustees were put in raising the amount on the faith of this engagement.

3. The moral obligation which rested upon the defendant

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as a member of the society, a corporator and legal voter therein, and the person who had requested, directed and superintended all the improvements which created the debt, as a consequence of which he had a new house of worship in which to attend divine service, to contribute to its payment.

A. Schoonmaker, Jr., attorney for plaintiff.

I. The agreement entered into by the defendant, and upon which the action is brought, is based upon an adequate and lawful consideration, and is a valid and binding obligation.

As well expressed in the charge, the defendant's agreement was, "For value received, I promise to pay to the consistory of the Reformed Protestant Dutch Church of Rochester the sum of \$250, for the purpose of paying off the indebtedness of said church, an indebtedness which I actively assisted in making while I was a member of said church and occupying a pew therein, and which debt I was, under moral obligation, to assist in liquidating, providing the officers of said church will circulate the paper and obtain the sum of \$5,000, including my subscription, with which the church shall pay off its debt."

The canon of construction which applies to this agreement, and by which we are to arrive at its true import, is furnished by the leading case of *Barnes agt. Perine* (2 Kern., 18). The court say: "If a good consideration for the promise can be proved, either in or out of the instrument, it is sufficient." And again, "the request and promise would have been valid if both had been verbal, and the written promise may be sustained by evidence of a verbal request, or by proof of any other consideration sufficient in law." And again, "a consideration for an undertaking may consist in a benefit or advantage to the promissor, or any obligation, harm, inconvenience or disadvantage incurred by the promisee upon the faith of the promise; and in the absence of fraud or other undue influence, the validity of the promise does not ordi-

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narily depend upon the amount or value of the consideration as an equivalent for the value of the thing promised."

And further, "the real party in interest, and both in the promise and in the action, is the corporation; and whatever was undertaken or done by the trustees, or by the building committee, was done and undertaken by the corporation. The acts of the agents were the acts of the corporation; and if any act was done or obligation incurred by either of their agents, as such, at the request of the defendant and relying upon his promise, it will furnish a good consideration for his agreement to pay."

The sole inquiry is, then, whether, under these principles, any legal consideration can be found either in the instrument or in the testimony.

II. The agreement being by its terms "for value received," expresses on its face a legal and sufficient consideration.

In the *Trustees of the First Baptist Society in Syracuse agt. Robinson* (21 N. Y., 234), which was an action on a church subscription, the subscribers, "in consideration of one dollar," agreed to pay the sums set opposite their respective names.

The court said, "there is a sufficient consideration expressed in the instrument to uphold the promise to pay of the subscribers."

In *Prindle agt. Caruthers* (15 N. Y., 425), the action was on an instrument in these words:

"For value received, I promise to pay to Henry Caruthers or his wife Elizabeth, annually, on the first day of April, during the life of the longest liver of them, the sum of two hundred dollars, if called for or needed."

The court say, "the paper signed by the defendant, * * when produced, would sustain the plaintiffs' case."

In *Miller agt. Cook* (23 N. Y., 495), the words "for value received," in a guaranty of a promissory note, were held to be a sufficient and adequate expression of the consideration

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within the statute of frauds, which required a note or memorandum to be subscribed *expressing the consideration*.

The same decision upon the same words has also been made in many other cases (*Watson's Ex. agt. McLaren*, 19 *Wend.*, 557; *Douglass agt. Howland*, 24 *id.*, 35; *Cooper agt. Dederich*, 22 *Barb.*, 516).

The force and effect of the words "for value received" were thoroughly considered in *Jackson agt. Alexander* (3 *John.*, 485, *marg.*). The question was whether those words were a sufficient consideration in a deed under the statute of uses, where a consideration was essential to the validity of the deed, and none had been paid in fact.

KENT, who delivered the prevailing opinion, said: "For value received is equivalent to saying money was received, or a chattel was received. It is an express averment *ex vi termini* of a *quid pro quo*." And further on adds, "value received does, in judgment of law, imply money or its equivalent. *The grantor must be estopped by this express averment in his deed.* He admits not only a value, but a value received from the grantee; and if we will not intend this value to be something valuable or equal to a competent sum of money, we seem not to construe charters as * * * the law axiom requires them to be examined, *benignly and in support of the substance.*"

In *Jackson agt. Root* (18 *John.*, 60, 78), the above case was followed in adjudicating the same words. A soldier, on the back of his discharge certificate, "for value received," made over and confirmed the lands described in the certificate, and the consideration was held sufficient to raise a use.

On the principle of these authorities, the promissor (the defendant) should be *estopped* by the "express averment" of consideration in the paper signed by him.

III. A legal and sufficient consideration for the agreement is shown in the actual as well as implied request to circulate the subscription, and raise the sum of \$5,000 to pay for the

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improvements which had been made by his request and direction.

The plaintiff offered to show that at the outset the committee waited on the defendant and asked him to subscribe, and that he requested them to circulate the subscription through the congregation, and when they procured within \$500 of the amount he would sign \$500.

The proof showed that they did so circulate the paper, and then called on defendant to fulfill his promise, when he subscribed the \$250.

The proof also shows that the plaintiff, through its agents the committee, spent two or three months in procuring subscriptions.

These facts bring the case within the rule in *Barnes agt. Perine* (2 *Kern.*, 18), before cited. The court say: "It is as if the defendant, either alone or with others, had come to the agents of the corporation and requested them to perform the acts mentioned, and delivered to them his written promise to pay a given amount as a compensation, or to enable them to do as requested" (*See also same case*, 9 *Barb.*, 202, and 15 *Barb.*, 250). To the same effect are *McAuley agt. Billinger* (20 *John.*, 89); *Farrington Academy agt. Allen* (14 *Mass.*, 172).

In *The Wayne and Ontario Collegiate Institute agt. Smith* (36 *Barb.*, 576), the court lays down this rule:

"Gratuitous promises to pay money *upon condition* or upon the happening of some event, or the doing of some act or incurring some expense, loss or legal obligation, become binding as legal and valid contracts upon acceptance and performance of the stipulated condition."

In *Hammond agt. Shepherd* (40 *How.*, 452), the rule cited from the above case was approved, and a note given to pay \$100 without any consideration expressed in it, but which another paper recited to be *on condition* that a certain college should "hold its doors open upon all moral subjects," was held to be valid.

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Even in *Stewart agt. Hamilton* (1 *Const.*, 581), judge GARDINER says: "If, with NELSON, Ch. J., we find that the defendant agreed to pay \$800, provided the plaintiff would procure subscriptions and should afterward invest the money, &c.; this, according to the cases, would amount to a request to perform those services, and the defendant would be liable."

In *Hutchins agt. Smith* (46 *Barb.*, 235), a subscription for the purpose of enabling the subscribers to raise a fund sufficiently large to entitle the subscribers to an act of incorporation from the regents, was held valid. And it was further held that the defendant, by erasing his name, could not exonerate himself from liability.

The principle that the signing of the paper is an implied request to perform the services required by the condition, and do the other acts contemplated, is recognized in all the cases cited and numerous others (*Richmondville Union Sem. agt. McDonald*, 34 *N. Y.*, 379-381; *L'Amoureux agt. Gould*, 3 *Seld.*, 349).

The last case also decides that the agreement was not void because the instrument does not bind the plaintiff to perform the acts which form the consideration.

IV. A sufficient consideration for the agreement also appears by the testimony, in the making of the repairs to the parsonage and the erection of the new church edifice. The fact that these were done by the defendant's request and direction makes the consideration sufficient, though executed when the agreement was signed.

The defendant said by his agreement, "for value received in the improvements which I requested and controlled, and impliedly promised to assist in paying for, I agree to pay \$250 to liquidate the debt which I created, on condition that the corporation will perform the service of raising \$4,750 more for that purpose."

Parsons states the rule as follows:

"It may be stated, as the general rule, that a passed or executed consideration is not sufficient to sustain a promise

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founded upon it *unless there was a request for the consideration previous to its being done or made*" (1 *Parsons on Cont.*, 391).

"But this previous request need not always be expressed or proved, because it is often implied" (*Id.*). Again, "from what has been said it will be seen that when the consideration is wholly executed, the law implies in some cases a previous request, *provided a promise be proved*" (1 *Parsons on Cont.*, 396).

Here the promise is expressly proved. And the past consideration is important only *in aid* of the request for additional and future services and performance of conditions.

The following authorities also sustain the principle that where there was an express or implied request for the consideration a subsequent promise to pay will be upheld (*Comstock agt. Smith*, 7 *John.*, 87; *Chaffer agt. Thomas*, 7 *Cow.*, 358; *Steenbergh agt. Provoost*, 13 *Barb.*, 365).

Where the debt for the payment of which the subscription is made is past due, an act done by the promisee on the faith of the subscription will sustain the promise (*Trustees agt. Garvey*, 53 *Ill.*, 401; *Trustees agt. Garvey*, 5 *Amer. R.*, 51).

V. The moral obligation resting upon the defendant to assist in paying for the new church, in which he might worship as a member, and which he had requested to be built, is also an element in the consideration of the agreement (*Wilson agt. Burr*, 25 *Wend.*, 386; *Goulding agt. Davidson*, 26 *N. Y.*, 604; *Comstock agt. Smith*, 7 *John.*, 87, note "C;" *Dusenberry agt. Hoyt*, 53 *N. Y.*, 521).

VI. It is a principle not to be overlooked, that in this country public policy requires such agreements to be sustained.

Parsons makes such a suggestion (1 *Par. on Cont.*, 378).

And in a case in this state it is said, "I am by no means satisfied that in this country, where all our religious, educational and charitable institutions are founded by voluntary associations and dependent upon private liberality, the personal benefit to be derived from the erection of a church

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edifice for worship by himself and family, or the erection of an academy or other institution of learning, in his immediate neighborhood, for the education of his children, are not works involving a sufficiency of private interest to every citizen, and of pecuniary benefit, to maintain a promise distinctly and expressly made, received and acted upon in the erection of buildings for such purposes." And adds that the denial of this principle "is a view of the question altogether too narrow for this great continent, over which civilization, law, and religious and educational institutions are to be spread and maintained purely upon the voluntary principle" (*The Wayne and Ont. Col. Inst. agt. Smith*, 36 Barb., 582).

VII. The condition expressed in the agreement, that the sum of \$5,000 should be subscribed, was fully complied with, as shown by the testimony.

The amount subscribed was \$5,190.50. The genuineness of the subscriptions was shown by actual proof of the signatures, and the still higher evidence of actual payments and the money in the treasury. In this way every subscription was proved except two, Jeremiah Schoonmaker, twenty-five dollars, and George Roper, five dollars, which still left an excess of \$160.

The entries made by the treasurer of the society were proper evidence of these facts.

They were entries made in the course of official duty; were cotemporaneous with the acts; the person who made them was deceased; he possessed competent knowledge of the facts and it was his duty to know them; and the entries were at variance with his personal interests (*Greenleaf's Ev.*, vol. 1, secs. 147 to 155; also secs. 115 and 116.)

The entry is original evidence (*Sec. 147*).

The ground upon which this evidence is received is *the extreme improbability of its falsehood* (*Id.*, sec. 148).

The rule goes so far as to admit the *private books* of a deceased rector or vicar of an ecclesiastical corporation.

The reason given is, "it is not to be presumed that a person

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having a temporary interest only will insert a falsehood in his book from which he can derive no advantage" (*Id.*, sec. 155).

The evidence having been properly received, the jury have found it to establish the fact.

VIII. The motion for a new trial should be denied and judgment affirmed, with costs.

James M. Cooper, attorney for defendant.

Charles A. Fowler, counsel.

This is an action brought to recover of the defendant \$250, on the following paper: "We, the undersigned, do hereby, for value received, promise to pay to the *consistory* of the Reformed Protestant Dutch Church of the town of Rochester the several sums set opposite our respective names, for the purpose of paying off the indebtedness of said church, on condition that the sum of \$5,000 be subscribed therefor. Dated January 28, 1868."

The answer is a general denial, and that the agreement was without consideration. This paper was signed by the defendant and others, and on the face of the paper there appears to have been \$5,185 subscribed in all, of which \$495 was subscribed after defendant's subscription was made.

The plaintiffs prove that defendant subscribed \$250 and said he would pay that, and would not subscribe \$500. They also were permitted to prove (under defendant's objection) subscriptions, by proving payments, and to prove payments by proving that the credits for payments were in the handwriting of John B. Van Leuven, deceased, formerly treasurer of the church; and they also proved that "the cash amount of moneys received corresponded with the subscription list." To all of which defendant objected.

They were also permitted to prove that the indebtedness resting on the church was for repairs theretofore put upon the church and parsonage under the supervision of the defendant, as one of a committee appointed by the church for that

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purpose. To this evidence defendant objected. There were four witnesses called by the plaintiffs, who prove subscriptions in the aggregate to the amount of \$6,823, exclusive of defendant's; but of this aggregate the subscriptions of C. Kortright, \$500; L. Krom, \$500; M. Kortright, \$500; J. B. Van Leuven, \$500; S. D. Baker, \$300; B. K. Hoornbeck, \$50, and Joseph Markle, \$75, amounting in all to \$2,425, is sworn to by both C. Kortright and L. Krom; and the amounts proved by Duryea and Schoonmaker are also included in the lists of both Krom and Kortright, thus leaving only the amount of \$4,398, or, including defendant's subscription, \$4,648, proved to have been at any time subscribed. There is not the slightest proof or pretense of proof that \$5,000, including defendant's subscription, had been subscribed at the time of the commencement of this action. The whole amount proved to have been paid is \$4,926.74, of which \$371.44 is for interest, or does not appear on the subscription paper, leaving but \$4,555.30 proved in this manner; or, including the defendant's subscription, \$4,805.30. There is nowhere any evidence that "The consistory of the Reformed Protestant Dutch Church of the town of Rochester" and the plaintiffs are the same body, or represent the same religious corporation. It nowhere appears that there are not two religious bodies bearing these several names. This point was raised by the defendant on the trial.

It nowhere appears that the persons who circulated the paper were trustees of the church, or the members of any consistory, except that it does appear that John B. Van Leuven was treasurer, and that he is dead. There was no evidence that the plaintiffs, or "the consistory," agreed to use the money in the payment of the debt, or that they have so used the moneys collected. It was shown that there was no consideration whatever for defendant's promise, unless the circulation of the subscription by Krom, Kortright and Van Leuven shall be held sufficient; and they, so far as the case shows, circulated it without authority.

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I. The plaintiffs cannot recover, because they have proved no subscription to them or for their benefit. The subscription was to pay to "the consistory," and not to "the trustees;" and there is nothing unreasonable in the supposition that there are two churches in Rochester bearing these respective titles, and nothing to show to the contrary in the evidence. And it was for the plaintiffs to show that they were meant by the terms used in the subscription paper. It was a part of their affirmative case.

II. The condition on which the subscription was to become binding has not been performed. The \$5,000 is not shown to have been subscribed at all; certainly not before the commencement of the action. And if it had, that was not sufficient consideration to support the promise (*Trustees Ham. Col. agt. Stewart*, 1 *N. Y.*, 581; *Barnes agt. Perrine*, 12 *N. Y.*, 30, 31).

III. The words "for value" in the paper may be contradicted, and in this case have been (*Pearson agt. Pearson*, 7 *Johns.*, 26; *Schoonmaker agt. Roosa*, 17 *Johns.*, 304; *Fowler agt. Shearer*, 7 *Mass.*, 14; *Boutell agt. Cowdin*, 9 *Mass.*, 254; *Harris agt. Clark*, 3 *N. Y.*, 93).

IV. There was no consideration for defendant's promise (*Hammond agt. Shepard*, 40 *How.*, 452; *Trustees Ham. Cpl. agt. Stewart*, 1 *N. Y.*, 581; *Barnes agt. Perrine*, 12 *N. Y.*, 18; *Phillips Limerick Academy agt. Davis*, 11 *Mass.*, 113; *Trustees, &c., agt. Gilbert*, 2 *Pick.*, 579; *Wilson agt. Baptist Ed. Soc.*, 10 *Barb.*, 314, 315; *Richmondville Union Sem. agt. McDonald*, 34 *N. Y.*, 381; *Van Rensselaer agt. Aikin*, 44 *N. Y.*, 130).

V. A new trial should be granted, with costs, to abide the event.

NOTE.—The general term, on motion made by defendant, refused leave to go to the court of appeals.

Hill agt. Newichawanick Company.

SUPREME COURT.

CHARLES E. HILL agt. NEWICHAWANICK COMPANY.

Stockholders — Dividends — when and to whom payable.

Where the directors of a corporation declared two dividends, the one payable on the day the same was declared, and the other at the *option of their agent*,

Held, that although no day was definitely named for the payment of the second dividend, and no time fixed for closing or opening books, to determine who otherwise would be entitled: stockholders, who were such on the day of the declaration of the dividend, are the persons who should receive it.

The person to whom scrip for stock has been delivered, with a transfer thereof, and power of attorney to perfect the transfer, is the legal owner of the stock, although the same has not been actually transferred on the books of the corporation.

December, 1874.

At a meeting of the board of directors of the defendant, held on the 25th January, 1873, it was voted that a dividend of four per cent be declared, payable that day, and that another dividend of four per cent be declared payable at *option of defendant's agent*.

C. D. Adams, for plaintiff.

W. H. Arnoux, for defendant.

VAN VORST, *J.*—The declaration of both dividends was absolute; the one was payable on the day the dividend was declared, the time of the payment of the latter was left to the determination of the agent. Those dividends, to be paid out of the property and assets of the corporation, belonged and were payable to the persons who owned stock on the day the

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same were declared. In a case like the present, where no day was definitely named for the payment of the second dividend, and no time fixed for closing or opening the books, to determine who otherwise would be entitled, with reference to which all interested might understandingly act, it would seem just to regard stockholders, who were such on the day of the declaration of the dividend, as the persons who should receive it.

Any other construction might put it in the power of the person upon whom the option was cast to fix the day of payment, to unnecessarily postpone the same, by which he might reap advantage to himself, through purchases of stock, at a price depreciated through such postponement (*Jones agt. Terra Haute & Richmond R. R. Co.* [Supreme Court, General Term, INGRAHAM, J.], 17 How., 529; *Spear agt. Hart*, 3 Robt., 420).

But on the day of the declaration of the dividends the plaintiff was not the legal owner of any stock.

The scrip for his shares had been pledged by him to the Park Bank, as a security for loans made, with a transfer thereof, and power of attorney, in 1871.

The Park Bank had the legal title to the stock under the delivery and pledge of the same, with the transfers thereof (*O'Neil agt. Tenth Nat. Bank*, 46 N. Y., 325; *Leitch agt. Wells*, 48 N. Y., 592).

The Park Bank, as such owner, was entitled to receive the dividends declared on the 25th January, 1873, and not the plaintiff. The legal owner was entitled to the dividend. The directors of the defendant took no further action in regard to the dividend declared payable at the option of the agent, and on the 7th November, 1873, the agent exercised the option by paying the dividend so declared.

The sale by the Park Bank to Burleigh, in July, 1873, did not pass to him the dividend declared while it was the holder and owner of the scrip. To have that effect, the sale of the dividend already declared should have accompanied the sale of the stock. There is nothing in the proposal of sale of the

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stock and the acceptance thereof which indicates that it was the intention of the vendor to pass the dividend to the vendee, with the stock. On the 11th February, 1873, the plaintiff, by an order in writing, directed the defendant to pay the dividend in question to the Park Bank. As the stock was then held by the Park Bank, but no transfer having been made on the books of the defendant to show that the Park Bank was owner, such direction was proper, to indicate to the defendant the person entitled to the dividend.

But on the 6th February, 1874, the plaintiff countermanded such direction, and demanded payment to himself of the dividend; and the Park Bank, who was the party legally interested in the dividend and entitled to receive it, consented to the countermand, and, by writing, authorized and directed the payment thereof to the plaintiff. The defendants, under the circumstances, should have paid the dividend to the plaintiff.

It is no excuse to the defendants that the dividend had been paid to Burleigh. He was not entitled to receive the same.

Although the legal title to the stock and the right to the dividend thereon was in the Park Bank, yet the plaintiff had still an interest therein. He could, by payment of the loans, redeem the stock. He was entitled to notice of its sale, and would have been entitled to any surplus arising on the sale over and above the loans made thereon. In the complaint the plaintiff describes himself as the owner of the stock at the time the dividend was declared, and as such entitled to the same. This, as has already been observed, was not strictly his position, as the legal title had passed from him. Yet, as no transfer had been made in the books of the defendant, he there appeared as the owner and entitled to the dividend. The only party interested to prevent the payment of the dividend to plaintiff was the Park Bank; and as the Park Bank had withdrawn all claim in favor of the plaintiff, the plaintiff is entitled to recover the same in this action, and judgment is rendered accordingly in his favor.

Willmont agt. Meserole.

NEW YORK SUPERIOR COURT.

ALFRED H. WILLMONT agt. CORNELIUS M. MESEROLE and others.

Liability of attorney as security for costs.

By the provisions of the Revised Statutes (3 R. S., 620, sec. 7), an attorney prosecuting an action for a non-resident plaintiff is liable for costs to an amount not exceeding \$100; and such liability can be enforced summarily, by order.

The attorney, however, may relieve himself of this liability, by giving the security required by the statute.

Where an attorney, not of record in the action, but only an attorney at law, signs a bond as security for costs for a non-resident plaintiff, it cannot be enforced against him by the court in a summary manner. The obligation can be enforced in no other manner than if it was the obligation of a person not an attorney or officer of the court.

Special Term, January, 1875.

THIS action was commenced in this court by a non-resident plaintiff.

The defendant obtained an order requiring the plaintiff to file security for costs in the sum of \$500.

Within the time limited by the order, the plaintiff caused a bond to be executed by N. McGregor Steele as surety, which was conditioned that said Steele would pay all costs which might be awarded to the defendant in the action.

The defendant recovered a judgment for costs amounting to upwards of \$1,400.

Upon an affidavit that Steele, the obligor, was and is an attorney at law (but not the attorney of record in the action), a motion was made for an order requiring Steele to pay to the defendant the said sum of \$500, the penalty of said bond.

Willmont agt. Mezerole.

C. M. Da Costa, for motion.

E. Hamilton, opposed.

MONELL, *C. J.*— This is a proceeding against Mr. Steele, as an attorney at law, and therefore an officer of the court, but not as the attorney of record in the action, to enforce some duty which it is claimed the law imposes upon him as such officer.

Under the statute (2 *R. S.*, 620, *sec.* 7), an attorney, prosecuting an action for a non-resident plaintiff, is liable for costs to an amount not exceeding \$100; and it is settled that such liability can be enforced summarily by order (*Jones agt. Savage*, 10 *Wend.*, 621; *Sigourney agt. Waddle*, 9 *Paige*, 381). The attorney, however, may relieve himself of this liability by giving the security required by the statute.

If Mr. Steele had been the attorney of record in the action, it is probable that, at least to the extent of \$100, the court, where the action was brought and prosecuted to judgment, might have proceeded summarily by order, directing the payment of that sum, unless his execution of the bond wholly relieved him from all other liability than such as attached to that obligation.

But Mr. Steele was not the attorney of record in this action, but only an attorney at law, and it is sought to reach him under the general power which courts are authorized to exercise over their officers.

Without determining whether that power is lodged exclusively in the supreme court, or whether it may not, to the extent, at least, of enforcing its orders, be exercised by this court, it is sufficient for the motion that Mr. Steele has not, in my opinion, incurred any liability in this case which can be enforced in this summary manner.

There is no provision of law, that I am aware of, which prohibits an attorney at law from becoming security for another person in an any matter in which he is not acting in

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the capacity of attorney for such person. The general rule recognized by the courts, that attorneys cannot be bail or security for their clients, was founded upon reasons of convenience, and to relieve attorneys from importunities of their clients, and clients of exorbitant exactions of their attorney.

But I think the rule has never been extended further than to exclude attorneys from becoming security for their clients, and in some action or proceeding in which they appear upon the record as such attorney, or are acting as the attorneys, or possibly as the counsel, of the person for whom they became security.

The general rules of court (*Rule 8*), which provides that in no case shall an attorney be surety on any undertaking, merely extends the ineligibility of attorneys to another kind of security.

But even this disqualification of attorneys was confined to such securities as were not required or regulated by statute. Hence, in *Walker agt. Holmes* (22 *Wend.*, 614), when, upon an order to file security, the attorney of record signed the bond, BRONSON, J., says: "The practice on requiring security for costs has been regulated by statute, and it is enough that the plaintiff has complied with the statute by executing a bond with a sufficient security, and the surety has justified."

The disqualification from becoming bail is general in its application, and an attorney would be rejected as bail, although he was not the attorney of the party bailed; and I am inclined to think that the disqualification extends generally to all suretyship. Clearly, the rule (*Rule 8*), as recently amended, covers all suretyships required by law.

But if, without objection, an attorney does become surety, he incurs no other or different responsibility than legally attaches to the obligation he signs; and it seems to me that such obligation can be enforced in no other manner than if it was the obligation of a person not an attorney or officer of the court.

The disability of an attorney to become security is ground

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of objection, and may be sufficient to reject him; but if he is allowed to remain without objection, it does not render the security void, nor does it raise any different liability than such as the instrument he signs would legally impose upon any other person.

In England, where the same rule in regard to bail exists, it has been held that bail by an attorney cannot be treated as a nullity, but is ground of objection only (*King agt. Sheriff of Surrey*, 2 *East*, 181; *Banter agt. Levy*, 1 *Chit. Rep.*, 713).

It has also been there held that an attorney is liable on his recognizance when it is entered into, notwithstanding he is prohibited from becoming bail (*Harper agt. Tacomden*, 1 *Chit. Rep.*, 714, *note*).

The rule as to bail in courts of law was never adopted in the court of chancery (*Micklethwaite agt. Rhodes*, 4 *Sandf. Ch. R.*, 434), in respect to security required by statute, and it was held, in the case just cited, that the solicitor might be surety upon a bond for costs; and in *Ryckman agt. Coleman* (13 *Abb. R.*, 598), the disability of attorneys was limited to bail for the appearance of the party arrested.

The general power over attorneys is, I think, confined to or exclusive in the supreme court. It is through that court that they obtain admission, and it is by that court they can be disbarred, or reached for any general misconduct, not immediately connected with actions or proceedings pending in other courts.

The power of this court extends only to attorneys who appear upon the records of this court, and are charged with misconduct in actions pending in this court, and which misconduct must relate to his office of attorney in such action. If, being an attorney, he does some act which he is disqualified from doing, but which is not done as the attorney of either party to the action, which might subject him to some liability to the parties, or either of them, he must be proceeded against in the court, which, in such a case, would have exclusive jurisdiction.

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The cases to which I was referred by the defendant's counsel are not opposed to the general principle which I have stated in respect to the power of courts over their officers, but they do not sustain the position that for any general misconduct any other than the supreme court can take cognizance (*In re John Percy*, 36 N. Y. R., 651).

I do not doubt that if this court could legally make an order requiring Mr. Steele to pay the defendant's costs, such order would, under the general powers of all courts to enforce obedience of its orders, be enforced by attachment against him.

But I have already determined that his mere signing of a bond as security was not the act of an attorney, and, therefore, imposed no special or peculiar liability upon him.

If, however, by doing so he violated any rule of the court, or was guilty of any breach of professional duty, he must be called to account for such violation or breach in another tribunal.

The motion must be denied, with costs.

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NEW YORK GENERAL SESSIONS.

THE PEOPLE agt. BRUNELL and others.

Cruelty to animals.

The trial in this case was upon an indictment for cruelty to animals. Judge SUTHERLAND, in an elaborate charge to the jury, delivered in his usual able and eloquent style, discloses valuable information as to the origin of this new law, and its application in suppressing and alleviating the torture and cruelty to the animal race, which frequently occurs, and which, before the passage of this humane and remedial statute, seems to have been practiced with impunity, especially by individuals of hasty, violent and ungovernable passions. "A merciful man is merciful to his beast," is a saying as true now as it was when first uttered.

At common law, cruelty to an animal merely upon the ground that it gave pain to the animal, and for the protection or for the sake of the animal, was not indictable. Although under certain circumstances acts of cruelty when publicly committed, to the annoyance of the public, or when committed with a malicious intent to injure the owner of the animal might have been indictable at common law.

This modern legislation, for the purpose of preventing unjustifiable cruelty to animals is the result of modern civilization, cultivated by the christian religion, arts and science.

Certainly, the purpose of these acts is praiseworthy. It is impossible for a high-minded man to say that unjustifiable cruelty is not a wrong—a moral wrong at all events, and why should not the law make it a legal wrong?

Mr Bergh's efforts, and the efforts of the officers of his society, in a discreet and judicious manner, to enforce these laws for the protection of animals and to prevent cruelty to them, deserve all praise.

The indictment in this case contains three counts. The first substantially charges that the defendants caused the horse mentioned in the indictment to be "overdriven." The second count intends to charge that the horse mentioned in it was caused by the defendants, in legal effect, to be cruelly and unjustifiably "overloaded." The third count substantially charges that the defendants caused the horse mentioned in it to be "tortured and tormented," by causing him to be hitched to a vehicle or

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omnibus, and driven and required to do the work which he was called upon to do under those circumstances, when he was in a certain condition as to strength, health and ability to do work, when he was suffering from certain ailments, defects and unsoundness specially stated in all the counts of the indictment.

The court charged the jury that if they were satisfied from the evidence that the horse was ailing, and defendants, Brunell and John Marshall, knowing this fact, caused the horse to be harnessed, driven and worked, as alleged in the second count of the indictment, they willfully, unjustifiably and cruelly caused the horse to be overloaded. And further charged, that if the jury were also satisfied from the evidence, that the defendants, Brunell and John Marshall, considering the condition of the horse, cruelly, willfully, unnecessarily and unjustifiably caused the horse to be driven and worked as alleged in the third count of the indictment, the horse necessarily was caused to suffer torture or torment or great bodily pain, and the jury should convict the two defendants, Brunell and John Marshall, of the offenses charged in said second and third counts of the indictment.

The court stated to the jury that the question, really, was not whether these defendants intended to torture the horse; the question really was whether they willfully caused certain things or acts to be done which did necessarily torture the horse.

November, 1874.

Before Hon. JOSIAH SUTHERLAND, City Judge, and a jury.

TRIAL upon indictment of the superintendent and proprietors of a line of city stages for causing and procuring a horse to be overdriven, &c. The facts appear in the charge to the jury.

Horace Russell, assistant district attorney, and Elbridge T. Gerry, for the people.

John R. Fellows and John B. Haskin, for the prisoners.

SUTHERLAND, *City Judge* (charged the jury as follows): *Gentlemen of the jury.*—This indictment was not drawn for a common law offense. It was drawn under certain statutes

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of this state to prevent cruelty to animals. It is not very important whether at common law it was an indictable offense to unjustifiably torture or inflict pain on an animal, on the ground that pain was thereby inflicted on the animal. My opinion is, that at common law, cruelty to an animal merely upon the ground that it gave pain to the animal and for the protection or for the sake of the animal was not indictable. I have very little doubt but that I am correct about that; though I stated that under certain circumstances, acts of cruelty when publicly committed to the annoyance of the public, or when committed with a malicious intent to injure the owner of the animal, might have been indictable at common law.

I suppose this modern legislation, for the purpose of preventing unjustifiable cruelty to animals, is the result of modern civilization, the humanity, I may say, which has sprung from, and has been cultivated by the christian religion, and by or through the art of printing, by which information upon subjects of morality and science, and a thousand other things, has been so easily spread throughout the community. Now, certainly, the purpose of these acts is praiseworthy. It is impossible for a right minded man, it appears to me, to say that unjustifiable cruelty is not a wrong, a moral wrong at all events, and why should not the law make it a legal wrong? Pain is an evil. Why should dumb creatures, domesticated to obey us, confiding in us, indebted to us for their food and subsistence, bound and taught to obey us, be unnecessarily and unjustifiably inflicted with pain? Have not they a right to appeal to the legislature for protection? Now, I think, all agree that Mr. Bergh's efforts, and the efforts of the officers of his society, in a discreet and judicious manner to enforce these laws for the protection of animals, and to prevent cruelty to them deserve all praise.

This indictment contains three counts. The first count substantially charges that the defendants caused the horse mentioned in the indictment to be "overdriven." It may

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be said with sufficient accuracy that the second count of the indictment intends to charge that the horse mentioned in it was caused by the defendants, I may say in legal effect, to be cruelly and unjustifiably "overloaded;" and it may be said that the third count substantially charges that the defendants caused the horse mentioned in it to be "tortured and tormented," by causing him to be hitched to a vehicle or omnibus, and driven and required to do the work which he was called upon to do under those circumstances, when he was in a certain condition as to strength, health and ability to do work, when he was suffering from certain ailments, defects, and unsoundness specially stated in all the counts of the indictment; and that in so causing him to be harnessed to the omnibus, and driven while he was in that condition, they caused him to suffer torment and torture. To convict the defendants, Brunell and John Marshall, under the second count of the indictment, you should be satisfied from the evidence that they willfully caused the horse to be harnessed to the omnibus, and to be driven and worked, as the evidence tends to show, that the horse was being driven and worked when stopped and unharnessed in the Fourth avenue, on the twenty-fourth of September; and, also, that when they so caused the horse to be driven and worked, they knew the condition of the horse in respect to his health, strength, soundness or unsoundness, ailments, fitness and ability to do the work; and, considering the condition of the horse in the respects just stated, you may find from the evidence the horse was ailing, when he was so caused to be harnessed, driven and worked, that the defendants, Brunell and John Marshall in causing the horse to be so harnessed, driven and worked, willfully, unjustifiably and cruelly caused the horse to be overloaded. To convict under the third count of the indictment, I charge you, that you should be satisfied from the evidence that they (these two defendants) willfully caused the horse to be harnessed and attached to the omnibus, and to be driven and worked, as the evidence tends to show the horse was

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being driven and worked when stopped and unharnessed in the Fourth avenue, on the twenty-fourth of September, and that when they so caused the horse to be driven and worked, they knew the condition of the horse in respect to his health, strength, soundness or unsoundness, ailments, fitness, ability to do the work, and considering the condition of the horse in the respects just stated, you may find from the evidence the horse was in when he was so caused to be harnessed, driven and worked, if you are further satisfied from the evidence that in causing the horse to be driven and worked, as he was being driven and worked when stopped and taken out of the harness on the twenty-fourth of September, the horse necessarily was caused to suffer torture or torment, or great bodily or physical pain. And, if you are further satisfied from the evidence that the defendants Brunell and John Marshall, considering the condition of the horse, cruelly, willfully, unnecessarily and unjustifiably caused the horse to be so driven and worked and to suffer such torture, torment or pain, then you will convict the defendants Brunell and John Marshall of the offense charged in the third count of the indictment. Certain witnesses, introduced on the part of the people, have testified in this case to the condition of the horse when taken out of the omnibus and unharnessed. Those witnesses are Mr. Bergh, the officer belonging to the society, who stopped the stage, the French veterinary surgeon (Dr. Liantard) and three or four other veterinary surgeons whose names you will recollect. Now, of course, it is for you to determine as to the credibility of these witnesses; it is for you to say whether you believe them or not, and it is for you to say what their evidence, if true, tends to show. But I assume, for the purposes of my charge, that the evidence these gentlemen have given, if true, tends to show that this horse was in a very diseased condition, full of ailments. They do not exactly agree. Some of these veterinary surgeons say they did not examine the horse, with reference to certain defects or diseases, but I think it may be said that the most of them, nearly all of them, agree

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about the condition of the horse. It struck me that the French veterinary surgeon (Dr. Liantard) was a remarkably intelligent man, from his manner and the answers to the questions. He appears to have come here certainly in no way connected with either the defendants or the complainant, though it seems he had been occasionally requested, as in this case, to look at horses, but he said he had never been in the habit of charging anything for his services. Now, I assume, that the testimony of these witnesses substantially tends to show that this horse had a crack in one of his fore feet from the toe up to the hair, and I think a greater crack on the other foot. I recollect distinctly Mr. Bergh swearing that when he saw the horse, I do not recollect whether it was the day he was taken out of the stage, or the next, but at all events about that time, when he saw the horse, blood and matter was running out of a crack in one foot. Well, their evidence tends to show, I assume, that he was badly knee-sprung in both knees; that he was spavined in both hind hocks. One of them distinctly swore, if I remember, that the fetlock-joints of the hind legs were stiff and did not work. Then one of the veterinary surgeons swore that he had what is called "sweeny," a wasting away of the shoulders; and I believe of all of them tended to show that there were certain excoriations of the skin above the fore feet; some evidence tending to show that this was probably done by stumbling. Then I may say that the evidence of all these witnesses, if true, and you believe it, tends to show that this horse was in an unfit condition to work. Some of them, I am sure, expressed the opinion that it must have given great pain or torture, to be worked in the condition he was in — that it was a cruel act to put him to work in that condition.

On the point as to the condition of the horse, various witnesses were called and have testified on the part of the defendants. The defendants Brunell and John Marshall were called and sworn; I believe all the defendants named in the indictment were called and sworn, and also one veterinary

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surgeon and other witnesses. I may say that their evidence tends to show that this horse was knee-sprung; and, perhaps, some of them testified that he was badly knee-sprung. I do not recollect that any of them said he was spavined; you will recollect what their evidence was. Some of them stated that he had one disease or defect, and some another. I think it may be said that their evidence, upon the whole, tended to show that the horse was in a fit condition to work, and that it was not a cruel thing to hitch him to the omnibus by the side of another horse, and to compel him to do the work expected or required of him in performing his omnibus route. One of these witnesses went so far as to swear — I think it was the defendant John Marshall — that when this horse was taken out of the stage, that in his opinion he could be driven forty miles in six hours. That is a pretty good gait. And I may say that some of these witnesses appeared to have intended to express the opinion, that the fact of the horse being knee-sprung and spavined, did not or would not hurt him for work, and upon the whole, that it was a good thing for him — that he was better off for being worked. Now, you will see, gentlemen, at once, that it will be necessary for you, from all this evidence relating to the condition of the horse, to determine, in view of the instructions I have given you, what was the condition of that horse, because you have got to determine whether it was unjustifiable and cruel for the defendants, if they did cause him to be harnessed and then driven and worked, to do so. Well that, of course, depends upon the condition of the horse, and probably it will be advisable and prudent for you, in the first place, to determine from the evidence, what was the condition of the horse, what state was he in as to health, ailments and ability to work. Now, gentlemen, I suppose even a New York omnibus horse may become unfit for work; I suppose that even a New York omnibus horse may be in such a condition in respect to debility, infirmity, strength, unsoundness, ailments, &c., that to hitch him to an omnibus and drive and work him as the horse

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mentioned in the indictment was being driven and worked, when the stage was stopped and he was taken out by one of the officers of Mr. Bergh's society, would be an act of cruelty. There is no pretense in this case, there is no evidence tending to show, that these defendants we are now trying, if they did cause this horse to be harnessed and thus driven, caused him to be so harnessed and driven, maliciously, or for the purpose of torturing and giving pain to the animal. The indictment does not allege any such thing. The indictment does not allege, nor was it necessary in my opinion for it to allege, that the defendants, in causing or by causing the horse to be harnessed and worked, intended to torture or to torment or to give him pain. If they caused him to be harnessed to the omnibus, and driven of course, they intended that he should do the work, with the aid of the other horse hitched with him, required of them. No matter how sick the horse was, no matter how diseased he was, if he was able to hold up and to tug along and do his work along side of the other horse down to the limit of the stage route and back again to the stable, he earned just as much money for them for that trip as though he had been one of those celebrated horses of Mr. Bonner. Now, whatever you may find from the evidence was the condition of the horse, as to his health and strength and bodily ailments, is it or is it not to be presumed from the evidence, that the superintendent, Mr. Brunell, and Mr. John Marshall, knew that condition; and, if you find he was in such a condition that the driving him and compelling him to do the work that he was doing when stopped, necessarily caused him torture, torment or great pain, are you not authorized from the evidence to presume that they knew that such driving and working would or must necessarily cause such pain, torment or torture. If they knew as much about the condition of the horse as you have found out from the evidence, knew his condition, and you find that in driving the horse as he was being driven, and in compelling him to work, as he was being compelled to work, the horse was necessarily caused

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to suffer torture, torment or great pain, must these defendants not be presumed to have known, if they caused the horse to be so driven and worked, that such would be the effect on or as to the horse? The maxim of the law is, that every person who willfully and intentionally does a certain act, which act is necessarily followed by certain results or consequences, must be presumed to have intended such results or consequences. He must be presumed to have known that such results would follow the act. It has been said that it was necessary to be shown on the part of the people, to authorize a conviction under either of these counts, that the defendants intentionally tortured the horse, intentionally gave him pain, intended to torture the horse. I have said that there is no such allegation as that in the indictment, and I repeat to you that I do not think it necessary that there should be such an allegation in the indictment. The question really is not, gentlemen, whether they intended to torture the horse; the question really is, whether they willfully caused certain things or acts to be done which did necessarily torture the horse. A. B. is seen most unmercifully and cruelly beating a horse over the head with a club or a cart rung. He is indicted for cruelly beating him, and he is being tried, and he is called as a witness on his own behalf and he swears: "True, I beat the horse, but I did not intend to hurt him; I beat him just as it is charged; I struck him repeatedly over the head with a cart rung, but I did not intend to hurt him." Would that evidence amount to anything? How are you to get at men's intentions, except from their acts and declarations? I have not intended to refer to the evidence at all in detail. I trust entirely to your memory as to what it is. I do not want to express an intimation about any question of fact in this case. I leave all such questions entirely to you. I had intended to confine my charge to points of law. I have substantially charged, that to convict the two defendants, Brunell and John Marshall both, you must find that they both caused the horse to be driven and worked so and so. That needs some expla-

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nation. The language of the indictment is, that the defendants named in the indictment caused, &c. The question is, whether the evidence shows that the defendants, Brunell and John Marshall, or either of them, and if only one, which of them, did so willfully contribute to, or so willfully promote, or procure, the commission of the alleged offense in the indictment, as that it can be said that, in legal effect, they or he caused the commission of the offense. The driver, Daniel Kane, probably hitched the horse with another to the omnibus. The driver, Daniel Kane, directly compelled the horses to move along and draw the omnibus. He was the man that directly compelled the horse to do that, in the doing of which the horse suffered the pain or torture, if he did so suffer. But the offense charged in the indictment is a misdemeanor, and the law is, that if A. B. procures C. D. to commit a misdemeanor, both A. B. and C. D. are criminally responsible as principals, though A. B. may not have been present when the misdemeanor was committed. The general principle of law is, that all who willfully or materially aid in procuring the commission of a misdemeanor, or who willfully in any way contribute to its commission, are criminally responsible, though not present when committed. The driver, who drove the omnibus to which the horse was attached on the twenty-fourth of September, was not indicted. The indictment is against others (the proprietors and superintendent) for causing the horse to be harnessed, driven and worked in the condition which the indictment alleges the horse was. If you are satisfied from the evidence, beyond a reasonable doubt, that, considering the condition of the horse, it was an act of unjustifiable cruelty and torture to drive and work the horse as he was being driven and worked, and that the defendants, Brunell and John Marshall, knowing such condition of the horse, willfully, in any way, aided materially in procuring or causing the commission of the act of torture and cruelty, or materially and willfully contributed to its commission, then you ought to convict them. Certain evidence has been received

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for the purpose of showing that both of these defendants really ought to be held criminally responsible for the alleged act of cruelty and torture, if it was an act of unjustifiable cruelty and torture. I submit to you the whole of the evidence on this point. It is for you to say whether, from the evidence of the defendant, John Marshall, and of others, it is not to be presumed that he knew the condition of the horse when driven and worked, as alleged in the indictment, and for some time previously. He was one of the proprietors. Of course, the superintendent was under his orders, and it must be presumed would obey any order he gave. It appears from the evidence, his own evidence and other evidence, that he was from time to time in the stable where the working horses were. That he sometimes looked them over. Does not the evidence then tend to show that he did know the condition the horse was in on the twenty-fourth of September, when, in the afternoon, he was hitched to the omnibus, and had been in for some time previously? He had but to say to the superintendent "that horse is unfit to work, send him to the hospital," and he would have been sent there. Is it not inferable from the evidence, that instead of doing so, the defendant, John Marshall, knowing the condition of the horse, left him among the omnibus working horses in the stable, to be required and compelled to do the ordinary routine work of a working omnibus horse? Now, considering all the evidence, are you not authorized to find from the evidence that the defendant, John Marshall, did, knowing the condition of the horse, willfully contribute to the commission of the alleged act of cruelty and torture, if the act was an act of unjustifiable cruelty and torture? Well, now, if you think not, find him not guilty. As to the defendant, Brunell, was he not the superintendent? Does not the evidence tend to show that Daniel Kane, the driver, in driving the horse was obeying the orders of the superintendent? That he was acting under the orders of the superintendent of the stables? It is for you to determine, as a question of fact, whether he (Brunell) did not cause the horse to be driven and worked as

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alleged in the indictment. Mr. Fellows has requested me to charge, and I do charge, that as to any fact or circumstance which you must find did exist or did take place necessary to convict these two prisoners or either of them, from the evidence, you should be satisfied beyond a reasonable doubt; if you have a reasonable doubt, the prisoners are entitled to the benefit of that doubt, but I charge you in that connection, that the doubt must be one arising legitimately from the evidence, and not simply the result of that unwillingness to convict which is often the weakness of timid-minded jurors. It ought to be a doubt arising from the evidence; that does not mean that a juror is authorized to sit back in his chair and say, "Well, I won't convict these people anyhow; I don't believe in Bergh." That would not be a doubt. If your doubt arises from such a feeling as that, it does not arise from the evidence. Well, now, I do not suppose such a remark is necessary to be made to this jury. We have been fortunate this term in having most intelligent jurors. It appears to me that the jurors in this court, somehow, are generally much more intelligent than in other courts. The whole questions in this case mainly are addressed to your common sense. The question as to the condition of the horse, and what the necessary effect of driving him, is a question which you can better determine, I am quite sure, than either counsel or myself. You probably have had more experience in such matters. I think this is a very important case. I do not know but that I might be pardoned a poetical exaggeration if I should suggest that the thousands of omnibus horses in this city, which are daily hammering away their existences in drawing vehicles, weighing from 2,000 to 2,600 pounds, over the hard stone pavement of this city, containing from one to nine passengers or more, weighing upon an average perhaps 150 pounds apiece—are now pleading with you not to convict these prisoners against evidence or law, but to do this—to carefully examine the evidence, and honestly and carefully render a verdict according to the law and the evidence, free from any prejudice or feeling.

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I meant to have read to this jury certain portions of the statutes. I think I ought to do so before they go out. I consider the act of 1874 merely explanatory, supplementary, to the act of 1867. Gentlemen, I meant to have read to you the provisions of the statutes which, I think, bear upon the questions that you have heard discussed here. It may be said, I think, that the indictment was drawn under the first section of the act passed April 12th, 1867. It is entitled "An act for the more effectual prevention of cruelty to animals." Now, the first section of that act is this: "If any person shall overdrive, overload, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill, or cause or procure to be overdriven, overloaded, tortured, tormented, or deprived of necessary sustenance, or to be unnecessarily or cruelly beaten, or needlessly mutilated or killed, as aforesaid, any living creature, every such offender shall, for every such offense, be guilty of a misdemeanor."

Now, I will read two sections from a subsequent act, passed in 1874: Section first. "Every person who shall willfully set on foot, or investigate, or move to, or carry on, or promote, or engage in, or do any act toward the furtherance of any act of cruelty to any animal, shall be guilty of a misdemeanor." Now, the eighth section of that act is this: "In this act, and in every law of this state passed, or which may be passed relating to, or affecting animals, the singular shall include the plural; the words 'animal' or 'dumb animal' shall be held to include every living creature; the words 'torture,' 'torment,' or 'cruelty,' shall be held to include every act, omission, or neglect, whereby unjustifiable physical pain, suffering, or death is caused or permitted; and the words 'owner' and 'person' shall be held to include corporations as well as individuals. But nothing in this act shall be construed as prohibiting the shooting of birds for the purposes of human food."

The jury, without leaving their seats, returned a verdict of "guilty" against both defendants. The court sentenced Brunell to a fine of \$200, and John Marshall to a fine of \$250.

O'Brien agt. Merchants' Insurance Co.

NEW YORK SUPERIOR COURT.

JAMES O'BRIEN, Sheriff, &c., agt. THE MERCHANTS' INS. CO.

Effect of a paper not put in evidence on the trial, improperly presented to the jury during their deliberations.

Where a paper, not in evidence on the trial, is clandestinely put into the books of account after the close of the testimony, containing criticisms, and suggestions in reference to the accounts, which are the subject of litigation, the account books being submitted to the jury in their deliberations, it is sufficient to set aside the verdict without reference to the source or motive of such interference.

*January 11, 1875.**Before MONELL, C. J., and CURTIS, J.*

IN this case, two account books, which had been put in evidence, were submitted to the jury, by consent of counsel, and taken by it into the jury room.

When the jury returned into court, it was discovered by plaintiff's counsel that a written paper, not in evidence, had been pinned to a leaf inside one of the books, which paper contained a criticism of the accounts, and suggested various defects and discrepancies in them, and reflected upon Mr. Candler, a witness for the plaintiff, who had kept the accounts.

Mr. John L. Douglass, the secretary of defendant, having the custody of the books, had prepared this paper, and placed it in the book, as he claimed, for safe keeping, and for the use of defendant's counsel in trying the case, and that it reached the jury inadvertently and unintentionally, by his forgetting it when the books were taken out.

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A compromise verdict was rendered, for less than the plaintiff's claim.

Wm. W. Badger, the plaintiff's counsel, on discovering these facts, moved to set aside the verdict and to punish defendant's secretary and counsel for making and allowing to be made an improper and surreptitious communication to the jury.

George W. Parsons, defendant's counsel, and *Wm. Allen Buller*, opposed the motion, and claimed that it was unintentional and accidental, as above set forth.

They also read an affidavit of Isaac V. Broken, the juror who had taken the books, that the jury had not read the paper in question, and was not influenced by it in any manner.

Justice G. M. SPRE, denied the motion, and plaintiff appealed from his order and the judgment was entered on the verdict.

The General Term, by *MONELL, C. J.*, and *CURTIS, J.*, reverse that order, and set aside the verdict and judgment, with costs, and grant a new trial.

The following is part of the long opinion by

CURTIS, J. — It is apparent that if this paper was thus placed before the jury, simply by the oversight of the defendant's secretary, as claimed, it was still an improper communication to the jury, and one for which the verdict should be set aside, unless it is shown that none of the jury read the paper, and that they were not influenced by it.

The history of the law discloses a struggle for centuries, to prevent juries from being approached by improper communications and influences.

Every expedient of human ingenuity has been thus resorted to in order to affect decisions upon the purity and justice of which society depends for its justice.

It is undesirable to have the long trial of this case repeated, unless we arrive at the conclusion that not to set aside the

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verdict would establish a precedent, and sanction a transaction which would tend to impair the upright and faithful administration of justice.

The defendant alleges that the paper thus reached the jury room by the oversight of its secretary, so that if the verdict is in consequence set aside, it will be a result due to a negligent act on the part of the defendant.

There are allusions and remarks in the paper tending to create suspicion in respect to Candler's good faith and the accuracy of his accounts.

The paper was put in the book by the defendant's secretary after the testimony was closed, and the counsel on each side had summed up.

It was fully and justly conceded on the argument that the defendant's counsel had no complicity in the matter complained of, and that he was in no way a consenting party thereto.

* * * * *

There appears to be no case where the courts have sustained a verdict upon the facts appearing that are disclosed in the present application.

On the other hand the tendency is to look with distrust upon all irregularities in respect to approaching jurors during the trial of a cause, or after they have withdrawn from the bar to consider the verdict. It has been held that where they were approached in such a manner as might have influenced their verdict it should be set aside, without reference to the source or motive of the interference (8 *Abb. Pr.*, 141; 9 *How. Pr. R.*, 14; *The Watertown Bank agt. Mic.*, 51 *N. Y.*, 558).

It is desirable to avoid any relaxation of the existing rules, and governed by them it is difficult to see how this verdict can be sustained.

The verdict and judgment should be set aside, and a new trial ordered, with costs to the plaintiff to abide the result of the action.

O'Connor agt. Moschowitz.

NEW YORK COMMON PLEAS.

DANIEL O'CONNOR, respondent, agt. SCHAU M. MOSCHOWITZ,
appellant.

*Removal of causes from district court to common pleas—duty of justice in
approving security.*

Where an undertaking with two sureties, who have justified in proper form, is presented to a justice of a district court in the city of New York, for the purpose of the removal of a proper case into the court of common pleas, the justice is bound judicially, to approve the undertaking and sign the order of removal.

The justice has no discretion in such a case to refuse to approve and accept of one of the sureties on the ground that he is personally acquainted with him and will not accept him as a responsible surety.

General Term, January, 1875.

Before DALY, C. J., and ROBINSON and LARREMORE, JJ.

THE appellant was sued in the district court in the city of New York, for the third judicial district, before justice FOWLER, for an amount exceeding the sum of \$100. After issue joined, he tendered to the justice an "undertaking on removing cause to the common pleas" and a proposed "order for such removal," in pursuance of subdivision 3, section 3, Laws of 1857, chapter 344, page 707, district court act (*Langbein's District Court Practice*, p. 41).

The plaintiff, availing himself of the practice and decisions, required the sureties on said undertaking to justify, and their examination was accordingly taken, plaintiff's attorneys making no objection as to their sufficiency. The justice approved the sufficiency of one of the sureties, but did not approve of the other, and refused to approve the undertaking or to sign

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the order of removal. To all of which the defendant took an exception, refused to furnish another surety or undertaking, claiming that the sureties were sufficient, left the court room and took no further proceedings in the action. The plaintiff obtained judgment by default for the sum of \$185.16 damages and costs. From this judgment the defendant appealed.

George F. Langbein, of counsel for appellant, made and argued the following points:

If the undertaking offered was correct in form, and the sureties therein were sufficient, the justice should have signed the order of removal, and he had no jurisdiction to render judgment, or take any further action in the case.

He was *functus officii*; his jurisdiction was arrested except to adjourn (*Hogan* agt. *Devlin*, 2 *Daly*, 184).

The statute referred to recites: "The justice shall make an order removing, &c., upon the defendant executing to the plaintiff an undertaking with one or more sufficient sureties, to be approved of by the justice of the court in which the action is commenced," &c.

The justice was bound to accept and approve any one or more responsible sureties. If the sureties were good in law, upon the face of their sworn examination, the justice could not from mere willfulness, caprice or whim, reject or disapprove of them.

This doctrine is conceded to be law in the case of *Adams* agt. *Ives* (8 *N. Y. Supreme Court Reports* [1 *Hun*], 457), in the opinion of TALCOTT, J.

The justice was to exercise a judicial discretion—a legal discretion, to be exercised in discerning the course prescribed by law; when that is discerned, it is the duty of the courts to follow it. It is to be exercised, not to give effect to the will of the judge, but to that of the law (*Tripp* agt. *Cook*, 26 *Wend.*, 143, 152). It must be a "sound discretion," said judge BRADY, in *Hogan* agt. *Devlin* (2 *Daly*, 184).

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Thomas H. Edsall, of counsel for respondent, argued that the justice had a right to satisfy himself, and that in this case the justice had stated he was personally acquainted with one of the sureties whom he would not accept.

The Court unanimously reversed the judgment, the chief judge stating that the sureties being sufficient in law, as shown by their sworn examinations, the justice was bound judicially to approve the undertaking and sign the order of removal. A judge should have no private reason—it must be a judicial reason and not an arbitrary, whimsical, capricious reason.

George F. and J. C. Julius Langbein, for appellant.

Dunning, Edsall & Hart, for respondent.

People *ex rel.* Kedian agt. Neilson.

SUPREME COURT.

THE PEOPLE *ex rel.* JAMES KEDIAN and another, respondents,
agt. WILLIAM H. NEILSON, President of the Board of
Education, and others, appellants.

*Board of Education, New York, not a part of the city government — how funds
are procured from the board.*

The board of education of the city of New York is not a department of the municipal government of that city, and the provisions of the charter 1878), in reference to the payment of moneys from the city treasury, do not apply to that board.

The several acts of the legislature relating to this subject contemplate that moneys required for the purposes of the board of education, or of the college of the city of New York, should be drawn out from the treasury of the city only by the draft of the president of said board of education, countersigned by the clerk of said board.

Neither the auditor nor comptroller of the city have anything to do with claims against the board of education.

First Department, General Term, October, 1874.

APPEAL from an order directing a mandamus to issue against the appellants.

J. W. Gerard, for relators.

E. Delafield Smith, corporation counsel, for appellants.

LAWRENCE, *J.*—I am in favor of affirming the order in this case, so far as it relates to the appellant Neilson; but I have, with great reluctance, been forced to the conclusion that the order below is erroneous, so far as it relates to the appellants

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Green and Earle. In my opinion, neither Mr. Green nor Mr. Earle has anything to do with the claim of the relators.

At the time the bills of the relators were audited by the executive committee of the college, and approved by the trustees, the board of education was not a department of the municipal government of the city of New York, and the provisions of the charter of 1873, in reference to the payment of moneys from the city treasury, did not apply to that board (*Laws of 1873, p. 492*).

The board of education, prior to the amendment to the charter of 1870, passed in 1871, had never been one of the departments of the city government, but had always been a separate organization, having its own separate funds, and empowered to draw money from the city treasury, in accordance with the provisions of special statutes (*Laws of 1871, vol. 2, p. 1244; see act referred to in Davis', P. J., opinion; also Davies' Laws, p. 1054, sec. 16*).

By the act of March 21, 1873, the board of education was again reconstructed as a distinctive educational branch of government, and was not made a part of the general city government (*Laws of 1873, p. 196*). So, too, in the enumeration of the different departments of the city government, contained in the charter, the board of education is omitted (*Charter, Laws 1873, p. 491*).

The provisions relating to the drawing of money from the city treasury (*Charter 1873, p. 491*) only relate to departments and officers of the city government as such, and do not, in my opinion, apply to this case, where, as is conceded by the court below and by the relators' counsel, the claim is neither against the city nor county.

The acts referred to in the opinion at special term, and other acts relating to the same subject, contemplate that moneys required for the purposes of the board of education, or of the college of the city of New York, should be drawn out from the treasury of the city only by the draft of the president of said board (of education), countersigned by the

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clerk of said board. The clerk of the board of education is not a party to this proceeding. He should have been made a party, and the mandamus should have been asked for against him as well as the president. The city auditor and comptroller were not, in my opinion, either necessary or proper parties to the proceeding; and the provisions of the charter, which are relied upon by their counsel, do not seem to me to give to the one the right to audit, nor to the other the right to draw, a warrant for any claim arising out of an employment by the trustees of the college of New York.

If it should be said that a portion of the relators' claim accrued while the board of education constituted a part of the city government, the obvious answer seems to me to be, that long before the work had been completed the board of education had been reconstructed as a separate and distinct governmental agency, and that the provisions of the city charter did not, therefore, apply to any action which that board, acting as the trustees of the college of New York, took, subsequent to the passage of the new act, and that the auditing, satisfaction and approval of the relators' bills took place subsequent to the passage of said act.

As it is admitted that the money has been raised; that the amount claimed by the relators is due, and that there is nothing but a technical objection to the payment of the relators, I think that the proper order in this case will be to affirm the order below, so far as it relates to the appellant Neilson; to reverse it as to the appellants Earle and Green, without costs, and with leave to the respondents to immediately apply to the court for a mandamus against the clerk of the board of education, to compel him to countersign the draft of the president of the board, in case such clerk should refuse so to do.

DONOHUE and DANIELS, JJ., concurred.

Devlin agt. Mayor, &c., of N. Y.

NEW YORK COMMON PLEAS.

CHARLES DEVLIN agt. THE MAYOR, &c., OF NEW YORK,
and others.

*Unconstitutional law — tax levy act of 1860, for New York City, void as to
cleaning streets.*

The provision of the tax levy act of 1860, authorizing the mayor and common council of the city of New York, to make contracts for cleaning the streets of said city, according to the terms and conditions prescribed by said act, is unconstitutional and void.

And such contracts cannot be enforced by the contractors or their assignees and successors.

If such a contract was valid, the contractor would have no right to assign it to others without the express sanction of the common council.

General Term, November, 1874.

APPEAL from judgment entered upon report of referee, in this court, in favor of plaintiff, Charles Devlin, for \$63,698.55, against the defendants, The Mayor, &c., of New York; and judgments in favor of defendant, Samuel Donaldson, for \$213,140.17; defendant, Anthony S. Hope, for \$18,779.10; defendant, Tilly R. Pratt, for \$53,359.90, and defendant, Charles D. Blish, for \$106,719.81, and defendant, Thomas Hope, for \$39,375.54, all against the defendants, The Mayor, &c., of New York.

J. F. DALY, J. — The contract for cleaning the streets of the city of New York, commonly known as the Hackley contract, on which this action is brought, was made on February 26th, 1861, between the mayor, aldermen and commonalty of the city of New York, of the one part, and Andrew J. Hack-

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ley, of the other, and provided that Hackley should sweep the streets, &c., as set forth in the contract, for five years from the date thereof, and should receive therefor the sum of \$279,000 per annum, in semi-monthly installments. The contract was awarded to Hackley by a vote of the common council of the city of New York, with the approval of the Mayor, after advertisement by the city inspector for proposals, pursuant to resolution of the common council, passed December 15, 1860, and after thirty-one bids had been received and opened, on December 29, 1860, in presence of the comptroller, and transmitted to the common council.

It appears by the proofs offered by plaintiff, that this contract was made in pursuance of authority supposed to be conferred upon the common council by the act of the legislature passed April 17, 1860 (*chapter 509, Laws of 1860, sec. 4*). That act is entitled, "An act to enable the supervisors of the county of New York to raise money by tax for city purposes, and to regulate the expenditure thereof; and authorizing the board of supervisors of the county of New York to levy a tax for county purposes, and to regulate the expenditure thereof, and also to borrow money in anticipation of the collection of the said tax, and to issue county revenue bonds therefor.

The first section of the act empowers the board of supervisors, as soon as conveniently may be after the passage of the act, to levy and raise by tax a sum not exceeding \$4,477,719.59 on account of the corporation of the city of New York, for the following purposes, and among others: "Cleaning streets, \$300,000."

The fourth section of the act provides that, "The appropriation hereinbefore provided and authorized for the cleaning of streets shall apply upon any authorized agreement or contract entered into for any term of years not exceeding five; and it is hereby declared lawful for the mayor and common council to authorize and make, or cause to be made, any agreement or agreements, contract or contracts, for cleaning

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the streets of the city of New York, and to which the said or kindred appropriations apply, for and during a term of years not to exceed five. * * * The proposals for said contracts shall be advertised in such newspapers as may be designated by said common council, and the contract or contracts shall be awarded as in the judgment of the mayor and common council shall be for the interest of the city. The work under said contract or contracts shall be performed under the supervision of the city inspector. The party or parties to whom such contract or contracts may be awarded shall give such surety as may be prescribed by the mayor and comptroller."

The act in question is the familiar "Tax Levy" of the year 1860 for the city and county, and these "tax levies" have been adjudged to be local acts (49 *N. Y.*, 133, and cases cited; 47 *N. Y.*, 501; 38 *N. Y.*, 193, and cases cited). The object of the act, as expressed in its title, is to raise money for city and county purposes, and to regulate the expenditure thereof, and to borrow money in anticipation of the tax levied under the act, and issue revenue bonds therefor. Any provisions of the act upon subjects not expressed in the title, nor necessary to carry out the objects of the act, would be unconstitutional and void (*Huber agt. The People*, 49 *N. Y.*, 132; *People agt. O'Brien*, 38 *N. Y.*, 193, above cited). Such a provision, it seems to me, is that authorizing the mayor and common council to make a contract of the kind described in the fourth section of the act for cleaning streets. It was proper for the legislature to declare that the \$300,000 appropriated for cleaning streets should apply upon any authorized agreement or contract entered into therefor, for any term of years not exceeding five; because that provision regulated the expenditure of the sum appropriated. But it was not necessary, in order to carry out such provision, that the legislature should, in the same act, provide for the making of a contract for an indefinite sum and for a longer period than one year, nor prescribe a mode of advertising for proposals,

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nor awarding the contract, nor for taking security in a mode different from that provided for by the charter then in force. The appropriation for cleaning streets was to be applied upon an "authorized" contract. But this did not necessitate the incorporating of the authority for the contract in the tax levy. Even if it did, the provision could go no further than authorizing a contract involving the expenditure in the aggregate of the sum actually appropriated for the purpose, and to be advertised for and awarded as the charter directed. The effect of this provision on the other hand was to authorize a contract to be made for a term of five years, at a yearly outlay for the whole period absolutely limitless in amount. If such authority could be conferred upon the pretense that it was a regulation of the expenditure of \$300,000, or was necessary to carry out the provisions of the act appropriating \$300,000 to clean the streets, then it would be lawful for the legislature to add to each item of appropriation in the annual tax levy an authority to the officers of the corporation to contract for expending a much greater amount for any number of years afterward without any of those restrictions and limitations which the charter provides. The result would be that each tax levy, under pretense of being a mere authority to raise money to carry on the municipal government for the current year, and regulate the expenditure of the money so raised, would become authority for binding the city for successive years to the payment of whatever sums the municipal officers might choose to contract to pay, and would, in addition to this, alter or repeal the provisions of the charter intended as safeguards for the tax-payers, and limitations of the power of the local officers. Nothing in the title of the act is notice that any restrictions upon the mode of expending money and making contracts contained in the charter were abrogated, nor that authority was conferred on the mayor and common council to bind the city for a term of years to pay annually any sum which, in their discretion, they might choose to contract to pay for cleaning the streets of the city.

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We are not left to conjecture what the results of such legislation might be. The mayor and common council proceeded, under the provision quoted, to enter into a contract with Hackley to pay him \$279,000 per annum for five years for cleaning the streets. Was this the regulation of the expenditure of the \$300,000 appropriated, and ordered to be levied and raised by tax for cleaning the streets of the city? The city charter, section 38 (*Laws of 1857, chap. 446*), provides that all contracts shall be given to the lowest bidder, and he shall give security for the faithful performance of his contract in the manner prescribed and required by ordinance. The tax levy act under consideration, on the other hand, provides that the contract shall be awarded as, in the judgment of the mayor and common council, shall be for the interest of the city, and that the party to whom such contract shall be awarded shall give such surety as may be prescribed by the mayor and comptroller. Here is then a repeal of the charter provisions so far as this contract for cleaning streets is concerned, a contract, perhaps the largest and most important to be awarded by the city. In the *People agt. O'Brien (supra)*, the provisions relating to the election of councilmen contained in the tax levy of 1866 were declared unconstitutional, because in effect they operated as an amendment to the city charter, and were foreign to the legitimate subjects of the tax levy. This decision leads to the conclusion that it is no part of the province of the annual act providing for the current expenses of the city government to alter the provisions of the charter, the organic law of the municipality. The reason of that decision controls the present case; if the provisions of the charter can be suspended or abrogated as to any particular subject of municipal control, concerning which an annual appropriation of money must be made, they may be suspended or abrogated—in effect repealed—so far as they relate to the vast number of matters embraced in the tax levies; and while the charter exists as the supposed limitation of power of the corporate officers, the annual levies

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may, in effect, provide temporarily for an entirely different administration of municipal affairs, removing restrictions, extending former powers, granting new ones, and changing the scheme of city government from year to year.

The necessity for a strict application of the constitutional provision, concerning local bills (*Const., art. 3, sec. 16*), was never greater than in the case before us, in view of the abuses that might result, and have resulted from it. It is not pretended that the contract in suit was awarded to the lowest bidder. The manner in which it was procured leaves no doubt that bribery was resorted to to obtain it.

The contractor himself, when placed on the stand, testified that while his bid was under consideration by the common council, he received an anonymous communication, suggesting that if he deposited \$40,000 in a certain place, his bid would be confirmed; that he got some money (he declined to say if it was \$40,000) from Mr. Hope, took it to a room in the city hall, and left it in a package on a table there; no person was in the room when he left the package, but there was a crowd of persons outside the room, several aldermen among them, whom he mentioned by name. That night his bid was confirmed.

Perhaps it was to prevent this "exercise of discretion" in the common council, as to the award of such bids, that a special statute was passed the next year (*Laws of 1861, chap. 808, secs. 1 and 2*), providing that all contracts should thereafter be awarded to the lowest bidder, and specially providing that this very contract, and the road contract mentioned in the act under consideration, should be awarded to the lowest bidder. The charter had contained such a provision, and it was to remove that restriction that the provision as to this contract was inserted in the tax levy, leaving it to be awarded "as, in the judgment of the mayor and common council, shall be for the interest of the city."

It is entirely without reluctance that I come to the conclusion, that the provision of the tax levy of 1860, authorizing

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the making of the contract in suit, was unconstitutional and void, and that the contract cannot be enforced by the contractor or his assignees and successors. For this reason, alone, the judgment should be reversed; but, there is another which, if my view be correct, would prevent a recovery by the plaintiff or the other assignees. The due and proper performance of the work of cleaning the streets affects the whole population of the city, whether it regards their health or their convenience. When the public officers, who are charged with this duty, are permitted to contract for it with public citizens, under provision of law directing them to award the contract as in their judgment shall be for the interest of the city, there is an implied discretion to be exercised as to the character of the person to whom it shall be awarded, as well as to the terms of the contract or the price; and, even if the contract to Hackley were valid, he would have no right to assign it to others without the express sanction of the common council. If they selected him as a fit person to perform the work, as we must infer they did, what right had he to substitute the performance of strangers in lieu of his own without the consent of the city? and whether the contract were to be awarded at discretion to any bidder, or to the lowest bidder only, there is every reason for holding that the contract is not assignable except by consent of the city. Section 47 of the charter of 1857, declares that no bid shall be accepted from, or contract awarded to, any person who is in arrears to the corporation upon debt or contract, or who is a defaulter as surety or otherwise upon any obligation to the corporation. Would an assignment of the contract to such a person be valid? and yet, if the power of assignment were absolute, it might be. The making of such a contract is in some sense a delegation of a public duty to a private person, to be performed for the public benefit. A notorious defaulter, or disgraced public official, whose connection with any public work would be circumstance of grave suspicion and alarm in the public mind, might, by assignment from the original contractor, be put in

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control of public works, and be vested with the performance of public duties with which no officer or department of the municipal government would venture originally to intrust him. The services of the contractor are essentially personal. His personal character and ability and solvency are considerations that enter largely into the discretionary exercise of powers such as were attempted to be conferred by the tax levy act in question. The authorities strengthen this view. The case of *Robeson agt. Drummond* (2 B. & Ad., 303) was that of a contract to furnish, for a term of years, a coach for the use of the defendant. The contractor transferred his contract to a third party, and the court held that the contract might, for that reason, be terminated by the other party; and the plaintiff, suing as assignee, was not allowed to recover damages on proof of his offer to perform and a refusal. The case of *Stevens agt. Benning* (1 K. & J., 168; 6 De G., M. & G., 223), was that of a contract between an author and a publisher, by which the latter was to publish the works of the former. The publisher assigned his contract, and his assignee was not allowed to recover upon the refusal of the defendant to allow him to publish his productions. The principle of those decisions applies with greater force to the case of a contractor with a municipal corporation, where the contract has been awarded, not to the lowest bidder, but in the exercise of discretion as to what award was for the interest of the city.

The judgment should be reversed and judgment absolute entered for the defendants, the mayor, aldermen and commonalty of the city of New York, against the plaintiff and the other defendants, with costs.

Other reasons might be assigned for reversing this judgment, but we prefer to put it upon the foregoing grounds, as it authorizes a final judgment for defendants, the mayor, aldermen, &c., of New York.

DALY, C. J., and LOEW, J., concurred.

Lange agt. Benedict.

SUPREME COURT.

EDWARD LANGE agt. CHARLES L. BENEDIOT.

Jurisdiction of judge—when he acts without jurisdiction, he is liable.

Where a judge, holding a court of limited or general jurisdiction, proceeds officially against a party, knowing that he acts without jurisdiction, having in fact no jurisdiction whatever, he is liable in an action, at the suit of the party injured, for such acts.

Where the judge holding the circuit court of the United States for the southern district of New York, upon the trial and conviction of the defendant in an indictment for a felony, sentenced him to pay a fine of \$300, and be imprisoned for the term of one year, which fine was immediately paid by the defendant, and he then went to prison, and subsequently was brought up on *habeas corpus* before the same judge, who, on reference to the statute, ascertained that the extreme penalty for the offense was imprisonment for the term of one year, or a fine of \$300, and the judge thereupon resented the defendant to one year's imprisonment; and, subsequently, the case was brought before the supreme court of the United States, upon *certiorari* and *habeas corpus*, which court:

Held, that the record of the circuit court's proceedings showed that at the moment the second sentence was rendered, that, in that very case, and for that very offense, the defendant had fully performed, completed and endured, one of the alternate punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish that offense was at an end. The court could render no second judgment against the defendant. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the constitution, and by the dearest principles of personal rights which both of them are supposed to maintain.

The defendant in that case, and the plaintiff in this, brought an action against the judge who resented him for false imprisonment, claiming \$50,000 damages. The defendant demurred to the complaint on the ground of want of jurisdiction in this court, and that the complaint did not state facts sufficient to constitute a cause of action.

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Held, that a judge of a court of either a limited or a general jurisdiction who attempts to enforce a judgment, which he knows to have been satisfied, makes himself liable to an action. Demurrer overruled, with leave to answer on payment of costs.

New York Special Term, January, 1875.

At the October term, 1873, of the circuit court of the United States, held in the southern district of New York, the Hon. CHARLES L. BENEDICT, the defendant, presiding, the plaintiff was arraigned under an indictment for feloniously stealing certain mail bags in use by the post-office department of the United States, and was tried and convicted, the jury finding in their verdict that the value of the bags stolen by the defendant was less than twenty-five dollars. The extreme penalty which the statute, under which the plaintiff was convicted, authorized the court to impose upon him, was that he should be imprisoned for the term of one year, or pay a fine of two hundred dollars (\$200).

On the 3d day of November, 1873, at said term of the court, the defendant sentenced the plaintiff to pay a fine of \$200 and be imprisoned for the term of one year. On the 4th day of November, 1873, the plaintiff paid to the clerk of the United States circuit court the said fine so imposed, and the clerk duly deposited the same to the credit of the treasurer of the United States with the assistant treasurer, at the city of New York. On the 7th day of November, 1873, a writ of *habeas corpus* was granted in favor of the plaintiff herein, returnable on the eighth day of November. On said eighth day of November, and during that same term of the court at which the plaintiff was convicted, the plaintiff was produced, in obedience to said writ, by the marshal, whereupon, after hearing counsel, the defendant, by order, vacated and set aside the sentence pronounced against the plaintiff on the 3d day of November, 1873, and proceeded to pass judgment anew, and resented the plaintiff to be imprisoned for the term of one year.

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On the 17th day of December, 1873, an order to show cause why a writ of *habeas corpus* should not issue, returnable before said circuit court, which motion was, on the twenty-fourth of December, denied. Thereupon, for the purpose of preserving the rights of the plaintiff, a writ of *habeas corpus* was issued by judge BLATCHFORD, returnable before the defendant on the 29th day of December, 1873. Upon the return day to this writ, it was ordered that the prisoner be remanded and the writ dismissed.

On the 13th of January, 1874, writs of *habeas corpus* and *certiorari* were duly granted by the supreme court of the United States, and such proceedings were thereon had that the said sentence, pronounced on the 8th of November, 1873, under which the plaintiff was then being held a prisoner, was adjudged to have been pronounced without authority, and the supreme court thereupon ordered and directed that the plaintiff be discharged, and this action was brought to recover damages for false imprisonment, from the 8th day of November, 1873, until the 29th of January, 1874.

The defendant demurs to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

B. F. Tracy, in support of demurrer.

Wm. Henry Arnoux, opposed.

VAN BRUNT, *J.*—In the points submitted by the counsel for the defendant, and also upon the argument of the demurrer, it was argued that the second sentence was lawful, and that the judgment of the supreme court of the United States upon that point is not binding upon this court.

Although the judgment of the supreme court of the United States as to the legality of the second sentence may not conclude the defendant, yet I do not think that it would be decorous in me to attempt to review the deliberate decision

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of the highest judicial tribunal in the land, and I shall only discuss, very briefly, the questions raised upon this demurrer, assuming the second sentence to have been without authority.

There is no principle which is better settled, than that no judge of a court of record is liable to action for a judicial act, and although in many of the cases distinctions are made between the liabilities of judges holding courts of limited jurisdiction and those of judges holding courts of superior or general jurisdiction, I do not think it necessary for the decision of this demurrer to determine whether the United States circuit court is to be considered, in respect to this case, as a court of limited or general jurisdiction.

The counsel for the plaintiff has cited several cases (4 *Dal.*, 11; 3 *Wheat.*, 336; 10 *Wheat.*, 192) for the purpose of showing that for some purposes, at least, that court is to be considered a court of limited jurisdiction.

I do not think it necessary to comment upon all the authorities which have been cited by counsel in support of their respective positions, because it seems to me that Mr. justice FIELD, in case of *Bradley agt. Fisher* (13 *Wallace*, 350), has stated the result to be derived from an examination of all the cases on this subject.

He says "that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excessive jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is an usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determina-

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tion as any other questions involved in the case, although, upon the correctness of his determination in these particulars, the validity of the judgment may depend. Thus, if a probate court, invested only with authority over wills and the settlement of the estate of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection for him in the exercise of the usurped authority.

"But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such acts, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although these acts would be in excess of his jurisdiction or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction of the subject-matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject-matter and person, applies in cases of this kind and for the same reasons."

The distinction here made between acts done in excess of jurisdiction and acts where no jurisdiction over the subject-matter exists, was taken by the court of queen's bench in the case of *Ackerly agt. Parkinson* (3 *Maule & Selwyn*, 411). In that case, an action was brought against the vicar-general of the bishop of Chester, and his surrogate, who held the con-

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ristorial and episcopal court of the bishop, for excommunicating the plaintiff with a greater excommunication of contumacy in not taking upon himself the administration of an intestate's effects to whom the plaintiff was next of kin. The citation issued to him being void, and having been so adjudged, the question presented was whether, under these circumstances, the action would lie. The citation being void, the plaintiff had not legally been brought before the court, and the subsequent proceedings were set aside upon appeal on that ground. Lord ELLENBOROUGH observed, "that it was his opinion that the action was not maintainable, if the ecclesiastical court had general jurisdiction over the subject-matter, although the citation was a nullity, and said that no authority had been cited to show that the judge would be liable to an action where he has jurisdiction, but has proceeded erroneously, or, as it is termed, *inverso ordine*."

Mr. justice BLANO said, "that there was a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction, and a case where he acts wholly without jurisdiction, and held, that where the subject-matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should, by reason of the error, be entitled to have the conclusion set aside, and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion as if the court had proceeded without jurisdiction.

"The general principle which seems to be established by this decision is, that in a court of superior or general jurisdiction which has the slightest claim to jurisdiction over the subject-matter, a judge will not be held liable in a civil action for an erroneous decision in favor of such jurisdiction, neither will he be held liable, where he has jurisdiction of the subject-matter, for excess of punishment, no matter how great such excess may be. Thus, in the present case, the plaintiff being convicted, and the defendant, as presiding judge of the court

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in which such conviction was had, sentenced the plaintiff to a punishment in excess of that allowed by law, yet he was not liable in a civil action to the plaintiff for any damages which he might have sustained by reason of such excessive sentence, because the defendant had jurisdiction both of the subject-matter and the person of the plaintiff.

"But if there is a clear absence of all jurisdiction, and this want of jurisdiction is known to the judge, no excuse is permissible, and he will be held liable in a civil action."

If, therefore, there was a clear absence of jurisdiction in the defendant to pass the second sentence, and this want of jurisdiction was known to him, this action will lie.

The United States court, in deciding the question of the validity of the second sentence, used the following language: "We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternate punishments to which alone the law subjected him, the power of the court to punish further was gone; that the principle we have discussed then interposed its shield and forbade that he should be punished again for that offense. The record of the court's proceedings at the moment the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed and endured one of the alternate punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the constitution and of the common law for the protection of personal rights, in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted, its further exercise was prohibited. It was error; but it was error because the power to render any further judgment did not exist."

In another part of the opinion the supreme court say, "that in the present case the court could render no second judgment

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against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the constitution, and by the dearest principles of personal rights, which both of them are supposed to maintain."

It is true that lord chief justice DEGRAY, in the case of *Miller agt. Serl* (2 Bl. Rep., 1141), said, "that the judges of the courts of general jurisdiction were not liable to answer personally for their errors in judgment. The protection as to them is absolute and universal. With respect to the inferior courts, it is only while they act within their jurisdiction."

It will be seen by the case of *Bradley agt. Fisher*, that the proposition, as stated by lord chief justice DEGRAY, cannot be maintained as broadly as he has laid it down, and that there may be cases where judges of courts of general jurisdiction will be held personally liable, not for errors in judgment, but for passing judgment at all in a case where it was clear they had no jurisdiction.

This view of the law is sustained by the case of *Houlden agt. Smith* (14 Q. B., 841). In that case it was held that a judge of a court of record is answerable in an action for an act done by his command when he has no jurisdiction, and is not misinformed as to the facts on which jurisdiction depends. The facts of that case appear to be as follows: The plaintiff, who dwelt and carried on a business at Cambridge, out of the jurisdiction of the Spilsby court, was sued in that court by leave of the judge, under statute 9 and 10 Victoria, chapter 95, section 60, the cause of action having arisen within the jurisdiction of the court, and judgment was duly obtained against him. Afterward, while the plaintiff still dwelt and carried on business at Cambridge, a judgment summons was issued by order of the judge of the Spilsby court, under section 98, calling upon the plaintiff to be examined as to his estate and effects, and the plaintiff not appearing, the judge, knowing the facts, but believing, nevertheless, that he had authority, made an order that the plaintiff should be com-

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mitted for contempt. The court say: "Although it is clear that the judge of a court of record is not answerable at common law, in an action for erroneous judgment, or for the act of any officer of the court wrongfully done, not in pursuance of, though under color of a judgment of the court, yet we have found no authority for saying that he is not answerable in an action for an act done by his command and authority, when he has no jurisdiction."

In the case now under consideration, the plaintiff having been convicted, and suffered and performed the full penalty which the law imposed upon his offense, was entitled to his liberty, and had the lawful right to assert his freedom by force after that sentence had been vacated. Under these circumstances, without any authority whatever, and in direct violation of and disregard for those rights which were guaranteed to the plaintiff, both by the common law and the constitution, he was sentenced to imprisonment for an offense which he had already expiated; which facts were known to the defendant at the time of pronouncing such sentence. At the time that Edward Lange was present in court, when the second sentence was pronounced, neither the marshal nor any other person had the slightest scintilla of right to restrain him of his liberty, because of the offense for which he had been convicted; and, in the eye of the law, he was as free as any of the persons who happened to be spectators in the court room on that day. And I do not think that it will be argued that a judge of a court of general jurisdiction can, of his own will and volition, without observing any of the forms required by law, imprison with impunity any of the persons who happen to be present within his court. Yet, if the judgment of the United States supreme court in this case is sound, this is precisely what was done to the plaintiff by the defendant. I know that it is necessary for the independence of the judiciary that the broadest shield of protection should be thrown around them in respect to their official acts; but this

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does not require that they should be exempt from all penalties when they clearly act without any claim to jurisdiction.

If the United States circuit court, as it has frequently been held to be, is a court of limited jurisdiction, then it would appear that under all the authorities, the defendant having acted, in passing the second sentence, without jurisdiction, he is liable in trespass.

I am aware that, assuming the United States circuit court to be one of general jurisdiction, the question is not free from difficulty; but I am of the opinion, after a careful examination of the authorities, that a judge of a court of general jurisdiction, who attempts to enforce a judgment which he knows to have been satisfied, makes himself liable to an action.

The demurrer, therefore, must be overruled, with leave to the defendant to answer on payment of costs.

Gaffney agt. Bigelow.

SUPREME COURT.

CHARLES GAFFNEY *et al.* agt. JOSHUA G. BIGELOW.*Service by mail—conditional notice on envelope.*

Where service of papers is made by mail, no condition should be reserved; the service must be absolute and complete at the deposit in the post-office.

Where the papers to be served, are inclosed in an envelope which has on its face a notice "If not called for in five days return to the attorneys" making the deposit in the post-office, is such a condition or qualification as vitiates the service.

Onondaga Special Term, February, 1875.

MOTION to set aside judgment as being irregularly entered after the service of a demurrer by mail.

Ruger & Jenney, for motion.*S. J. Darrow*, opposed.

MERWIN, J.—The defendant's attorneys in this case, reside at Syracuse and the plaintiffs' attorney at Utica. On the last day for answering the complaint, the defendant's attorneys deposited in the post-office at Syracuse, a demurrer properly enveloped and directed to the plaintiffs' attorney at Utica. Upon the face of the envelope there was printed the following: "If not called for in five days, return to Ruger, Wallace & Jenney, attorneys, &c., Syracuse, N. Y." Upon the following day, this was received by the plaintiffs' attorney by mail, and he on the same day returned it with a notice that

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he declined to receive it; that it was not sent in time; that the service by mail was bad by reason of the condition or qualification indorsed on the envelope to return if not called for in five days.

The letter not being in fact received until after the expiration of the time to answer, the defendant must rely upon his service by mail at the time of the deposit at Syracuse, and the question, therefore, is whether the indorsement referred to was such a condition or qualification as to vitiate the service.

I understand the late Mr. justice DOOLITTLE decided that such service was bad, and I am inclined to concur with him.

Courts have always held to a strict performance on a service of this kind (1 *Hill*, 217). The mailing, for instance, must be at the place where the attorney resides (1 *Barb. Ch.*, 649; 13 *How.*, 57; 4 *How.*, 246), although no harm comes from such mailing. If not strictly regular, the mailing party takes the risk of its being received in time.

If an indorsement to return if not called for in *five* days, could be made, the same principle would allow one to be made to return in *one* day.

It seems to me the mailing should be absolute and unconditional. No control over it should be reserved in any event. The rule that the service is complete at the deposit, is one that in many cases works hardship to the opposite party. The party getting the benefit of it should, therefore, strictly comply.

The motion is, therefore, denied with costs.

Gallation agt. Smith.

SUPREME COURT.

ANDREW B. GALLATION, Receiver, agt. LEWIS M. SMITH and
FRANCOIS G. HALL.

When judgment creditors will be charged with costs.

Where judgment creditors procure an action to be brought in the name of a receiver appointed in supplementary proceedings instituted by them, they will be charged, on motion, with the costs of a successful defense of the action.

Where it appears that a receiver did not commence an action on his own responsibility, but that he allowed the judgment creditors to use his name and they employed the attorneys for the receiver, the action thus instituted by such attorneys, in the name of the receiver, will be deemed to have been "brought" by such creditors.

Tompkins Special Term, February 13, 1875.

MOTION by defendants to charge Lomore Bros. & Co. with the payment of the costs of this action, entered in a judgment in favor of the defendants against plaintiff.

The moving affidavits showed that Lomore Bros. & Co., judgment creditors, instituted supplementary proceedings against one Coke, and therein had the plaintiff Gallation appointed receiver; that thereupon this action was brought to reach Coke's property, alleged to be in defendants' hands, and to obtain satisfaction of Lomore Bros. & Co.'s judgment; the receiver did not commence the action on his own responsibility, but at the instance and request of the attorneys for said judgment creditors, and such attorneys conducted the action, he permitting them to use his name and they not being employed by him or expecting pay from him, but acting for

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said creditors. The action was not sustained, and judgment for costs was entered against the receiver, which remained unpaid.

The affidavits in behalf of the judgment creditors in opposition to the motion, controverted the moving affidavits and denied that there had been any interference on their part sufficient to make them chargeable with having brought the action, or liable for the costs.

The other facts appearing, are sufficiently stated in the opinion.

David B. Hill, for the motion.

E. P. Hart, contra.

BOARDMAN, J.—If Lomore Bros. & Co., by themselves or their attorneys, brought this action in order to secure payment of their debt against Coke, they should be made to pay the costs incurred by defendants.

It is conceded that Lomore Bros. & Co. conducted the supplementary proceedings to discover property of Coke; that certain property of Coke's, in defendants' hands as collateral security, was discovered; that they or their attorneys thought said property was more than sufficient to pay defendants' debt against Coke, and was sufficient in addition to pay L. B. & Co.'s debt; that on the same day of such discovery, plaintiff was appointed receiver, on the basis of such supplementary proceedings, by the attorneys of L. B. & Co., who had also acted on such supplementary proceedings; that the same attorney, thereupon begun this action in the name of the receiver, and that L. B. & Co. alone would receive the proceeds of any judgment plaintiff might recover and collect in the action. Beyond this there is some controversy.

According to plaintiff's affidavit he did not employ the attorneys, or expect or agree to pay them, but that they were employed by and acted for L. B. & Co.; that plaintiff simply

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allowed the use of his name, as receiver, at the request of L. B. & Co.'s attorneys, and for their benefit, with an agreement that he should in no event be put to any trouble, costs, or expenses, except the mere formal trouble necessary in signing the legal paper necessary in the action; that the action was conducted by L. B. & Co., and their attorneys, and that L. B. & Co. recognized such attorneys as acting in their behalf, but only upon an adventure. This evidence is corroborated by the affidavits of James Wright, Geo. A. Brush and Lewis M. Smith.

In opposition, we have a number of affidavits. They do not deny that the writ was brought to collect L. B. & Co.'s debt; that they knew it was to be bought by their attorneys, and assented to its being brought, upon the understanding that they could not be made liable for costs, and that during its pendency they recognized it as their action.

Under such circumstances, I am inclined to hold that the action was brought in the plaintiff's name by L. B. & Co., for their own sole and exclusive benefit, and by their own attorneys acting in their behalf.

The facts that L. B. & Co.'s attorneys, acting in their behalf in the collection of this debt, conducted the supplementary proceedings, discovered what they thought were available assets in defendants' hands, procured the appointment of a receiver, and brought this action with the knowledge and consent of L. B. & Co., all on the same day, ought to satisfy me, I think, that they were the sole parties in interest and the persons who procured the action to be brought.

It is certainly apparent that Hart and Tomlinson were the attorneys of L. B. & Co., in the supplementary proceedings, and continued to act as such in the new action, with the knowledge and assent of L. B. & Co.

This constitutes sufficient evidence of a retainer in that action. No one pretends they were retained by the plaintiff or Coke, or that any other person than L. B. & Co. had any pecuniary interest in having it brought, or in its results.

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Under such circumstances, and under the authorities, I deem it just that L. B. & Co. should pay the costs incurred by the defendants in their successful defense.

The following cases illustrate the application of this rule: *McHench* agt. *McHench* (7 *Hill*, 204); *Whitney* agt. *Cooper* (1 *Hill*, 629); *Giles* agt. *Holbert* (12 *N. Y. R.*, 32); *Outler* agt. *Reilly* (31 *How. Pr. R.*, 472); *Bliss* agt. *Otis* (1 *Denio*, 656; 2 *R. S.*, 619, § 44).

The action was brought without leave of the court, and thus furnishes an additional reason why the costs should be charged to the real plaintiff, if the facts are such as to justify it.

The motion of defendants is therefore granted, ~~by~~ without costs of this motion.

Bronson agt. Bronson.

SUPREME COURT.

MARY BRONSON agt. OLIVER BRONSON, WILLET BRONSON,
JOHN J. TOWNSEND *et al.*

Appointment of executors of a will by petition to the court — removal of executor denied.

The supreme court has the power to appoint such persons as they may see fit, executors of a will to fill the vacancies caused by the death of other executors.

It is in accordance with the practice of this court, and of the court of chancery, to make such appointment upon petition.

The executors, as trustees of a large estate, have the right, in its management, to charge the estate with the expenses of clerk hire and office rent. And it is not a breach of good faith for one of the executors, who has the custody of the books, to make such charges, although strenuously objected to by his co-trustees.

The refusal of a trustee having the custody of the books and papers of the estate, to deliver them up to his two co-trustees upon their joint demand, cannot be sustained. But this refusal is not such misconduct as to call for his removal from the trust.

The testator by his will and codicil provided, that the interest, rents, issues and profits of that portion of his estate which should be allotted to any one of his daughters, as directed in the fifth article of his will, should by said trustees be applied to the sole and separate use of each daughter respectively, for whom the same should be holden in trust, and should be exempt from the control and debts of her husband; and on receiving a receipt or discharge of any *cestui que trust*, executed under her hand to them, acknowledging a sum applied to her use, said trustees should be absolved from any further obligations, in any way or manner, to pay the same sum.

The testator nowhere, either in his will or in the codicil, provided for or made any distribution of any accumulations, and one of the questions to be determined is, to whom the accumulations belong.

Held, upon an examination of the will and codicil, that it was the intention of the testator, that the rents, issues and profits, of the portion allotted to any one of his daughters, should belong to her absolutely;

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and that all the income derived from the plaintiff's portion of her father's estate, and which has been allowed to accumulate in the hands of the trustees, belongs to her, and she is entitled to claim the payment of the same to her by the trustees, upon presentation of a proper receipt therefor.

Special Term, February, 1874.

ISAAC BRONSON died on the 9th of May, 1838, leaving a last will and testament, dated June 8, 1829, and also a codicil thereto, dated March 3, 1838, and also a further codicil thereto, dated April 4, 1838.

The said will and codicils were each duly executed according to law, to pass real and personal estate, and were duly proved before the surrogate of the city and county of New York.

By the second clause of said will, the said Isaac Bronson constituted and appointed his wife, Anne, his sons, Oliver Bronson, Arthur Bronson and Frederick Bronson, and his son-in-law, Dr. Marinus Willet, trustees under his said will, and executors thereof, and gave, devised and bequeathed to them, and to the survivors of them, and to such person or persons as might be associated with them, or succeed them in said trust, all his estate, both real and personal.

The said Isaac Bronson further provided, that upon the decease of any of the trustees above named, the survivors should have power to appoint another person in his or her place or stead; and he further provided, that the trustees so appointed, should be invested with the same power and interest which the deceased trustees had.

The said Isaac Bronson, after providing for the division and allotment of his estate to the several persons named in his will, directed that the portion allotted to each of his daughters should remain in the possession of said trustees, and be and continue their estate at law during the natural life of such daughter; and that the interest, rents, issues and profits, should be paid to her as they accrued during her

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natural life, and that they should not be under the control of her husband or subject to his debts, but be to her sole and separate use; and on her decease, her portion should be conveyed and delivered to her issue, to be and belong to such issue forever.

By the codicil dated March 30, 1838, the said Isaac Bronson, after reciting that the codicil was made because he was desirous of making alterations in his said will, in order that the same might be more conformable to existing laws and for other reasons and purposes, provided that the interest, rents, issues and profits of that portion of his estate which should be allotted to any one of his daughters as directed in the fifth article of said will, should, by said trustees, be applied to the sole and separate use of each daughter respectively; and that on receiving a receipt or discharge of any *cestui que trust* executed under her hand to them, acknowledging a sum applied to her use, said trustees should be absolved from any further obligations in any way or manner to pay the same sum.

By the said codicil the said Isaac Bronson revoked the appointment of his wife, Anne Bronson, and of his son-in-law, Dr. Marinus Willet, as executors and trustees of his said will.

That, upon the probate of said will and codicils, letters testamentary were issued to the said Arthur Bronson, Frederick Bronson and Oliver Bronson, and they each qualified and undertook the execution of the trust of said will.

That the said Arthur Bronson died about the 18th of November, 1844; the surviving trustees did not, as required by said will, appoint a new trustee in his place.

That the plaintiff, Mary Bronson, is one of the children of Isaac Bronson, and there has been allotted to her, at the various divisions of her father's estate, as her portion, sums amounting in the aggregate to about \$200,000.

That the said Mary Bronson has not received, nor has the same been applied to her use, the whole of rents, issues and

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profits of her portion of her father's estate, but that the same have accumulated in the hands of the trustees until such accumulation amounts to a little over the sum of \$200,000.

That Frederick Bronson, another of said executors and trustees, died about November 1, 1868, leaving Oliver Bronson the sole surviving trustee.

That in the year 1869, Oliver Bronson presented his petition to this court, asking that the defendants, Willet Bronson and John J. Townsend, should be associated with him as trustees in said trust. That the said plaintiff, Mary Bronson, consented, in writing, to the appointment of said Bronson and Townsend as such trustees.

This court thereupon appointed, by an order duly made, the said Willet Bronson and John J. Townsend as trustees under said will and codicils of Isaac Bronson, with said Oliver Bronson, in the place of said Arthur and Frederick Bronson, deceased; and since such appointment the said Willet Bronson and John J. Townsend have been acting as trustees with said Oliver Bronson.

That the said Oliver Bronson has, for a long series of years, on account of his health, been accustomed to reside, from the first of November to the first of June, in each year, in the state of Florida.

That Frederick Bronson, up to the time of his death, in 1868, had sole charge and control of the said trust estate, and the said Oliver Bronson did not at all participate in the administration of said trust.

That the said Frederick Bronson had an office in Wall street, at which the business of said trust was conducted, together with that of several other estates of which he had charge during his life. Frederick Bronson employed clerks and book-keepers for the purpose of keeping the accounts relating to said several estates; and from the year 1852, Mr. Elias L. Smith was the book-keeper so employed by Frederick Bronson. During the whole time of the administration of Frederick Bronson, the expenses for office rent and clerk hire,

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were charged in certain proportions to the several estates of which he had charge.

That the said Frederick Bronson also charged five per cent for his commissions as trustee. That, during the whole of his administration of said trust, no objections were raised or suggested to said charges for office expenses and commissions. That, before and at and after his appointment, the said John J. Townsend agreed that none but legal charges should be made against said estate. That, after his said appointment, the said Townsend being the executor of Frederick Bronson, deceased, conducted the affairs of the trust under the will of Isaac Bronson, deceased, in the same manner and in the same office as they had been conducted by Frederick Bronson in his lifetime. That Mr. Smith had the charge of and kept the books of said estate as he had theretofore done.

That, in November, 1868, upon learning of the death of his brother, Oliver Bronson wrote to Mr. Smith, requesting him to continue in charge of the books of his sister's estate, as he had hitherto done, and expressing great satisfaction as to the manner in which he had attended for so many years to the business.

That, shortly after the appointment of said Townsend and Willet Bronson, disputes arose between them as to the legal right of the trustees to employ a clerk and charge his salary to the estate, Willet Bronson claiming that they had no such right, and Townsend insisting that it was a proper legal charge. Townsend, accordingly, in making up the accounts of the estate of Mary Bronson, charged, as had always theretofore been done, to said estate a certain proportion of the office rent in which the business of the estate was conducted, and also of the hire of the clerks who had charge of and kept the books.

The making of this charge produced warm and heated discussions between Townsend on the one side, and Oliver Bronson and Willet Bronson on the other.

That said disagreements, in December, 1869, culminated in

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a demand by Willet Bronson that all the books and papers connected with said estate should be transferred to him, which demand was made with the sanction and approval of Oliver Bronson.

That, as early as the middle of December, 1869, the said Oliver Bronson and Willet Bronson resolved to eject Townsend from the trust, and consulted counsel in respect thereto. And upon being informed that an action for that purpose could not be brought by a co-trustee, Willet Bronson first communicated the differences which had arisen to the plaintiff, Mary Bronson, in order that she might be induced to bring a suit in her name, for the purpose of having Townsend removed. Townsend also claimed that all the accumulations which had not been applied by the trustees to the use of Mary Bronson formed a part of the trust estate, and was to be held by the trustees in the same manner as the principal. Oliver Bronson and Willet Bronson claimed, upon the other hand, that the whole of the income, including that which had accumulated, belonged absolutely to Mary Bronson; and, under their advice, Mary Bronson drew an order upon Townsend for the sum of \$6,000, which Townsend refused to pay. That said order was drawn for the purpose of getting a refusal from Townsend, in order to make the same the basis of a charge against him.

That various other orders were also signed by Mary Bronson, at the solicitation of Willet Bronson, and for a like purpose.

In March, 1870, this action was commenced, for the purpose of procuring the removal of John J. Townsend from the trust.

James Emott, for Mary Bronson, plaintiff.

Stephen P. Nash, for defendants Oliver and Willet Bronson.

Joseph Choate, for defendant Townsend.

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VAN BRUNT, *J.*— The plaintiff in this action founds her claim to relief upon the following grounds :

First. That this court had no power to appoint Willet Bronson and John J. Townsend to fill the vacancies caused by the death of Arthur and Frederick Bronson.

Second. That, even if this court had the power to fill the vacancies caused by the death of Arthur and Frederick Bronson, upon a proper application being made to it for that purpose, the presentation of a petition did not authorize the exercise of that power ; but that the application must be made by bill filed.

Third. That, even if the appointment of the defendants Willet Bronson and John J. Townsend is adjudged to be valid, the said Townsend has so misconducted himself in the matter of said trust, that he should be removed therefrom.

The said plaintiff also claims that it shall be adjudged in this action that all the rents, issues and profits which have arisen from that portion of the estate of her father, Isaac Bronson, which has been set apart as her share, and which she has allowed to accumulate in the hands of said trustees, belong absolutely to her, and do not form any part of the trust estate which the said trustees are entitled to hold.

The first question which it is necessary to consider is : Had this court the power to appoint the defendants Willet Bronson and John J. Townsend to fill the vacancies caused by the death of Arthur and Frederick Bronson ?

It is a well established rule, and needs no authority for its support, that the court of chancery has a general jurisdiction, entirely outside of and beyond that conferred upon it by the Revised Statutes, in respect to all trusts and trust estates.

It is because of this general jurisdiction that the court of chancery was accustomed to appoint a trustee to execute a trust where there was no trustee named in the instrument creating the trust, who was willing to take upon himself its execution.

The familiar maxim being, that the court will never allow

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a trust to fail for want of a trustee. The same principle has been invoked in respect to many powers which are usually conferred upon trustees.

In the case now under consideration it is to be observed that the devise to the trustees is peculiar in form. It is not to the trustees and to the survivors and survivor of them, but it is to the trustees and survivors of them, and to such person and persons as may be associated with them or succeed them in said trust.

The testator then gives to the survivors, upon the decease of any of the trustees, the power to appoint another person in his stead, and expressly invests such appointee with the same power and interest which the deceased trustee had.

It is further to be observed, that this power of appointment to fill any vacancy, caused by the death of any trustee, could only be exercised by all the surviving trustees; and, that if two trustees should die, without the vacancy caused by the death of the first being filled, the power of appointment by the surviving trustees was forever gone.

It would seem that these circumstances clearly indicate that it was the intention of the testator, that the trust should be kept full, and that it was the duty of Frederick and Oliver Bronson, to have filled at once the vacancy in the trust, caused by the death of Arthur Bronson.

This duty having been imposed upon Frederick and Oliver Bronson, and they having neglected to perform it, until, by the death of Frederick Bronson, it became impossible to do so in the manner prescribed by the testator, it devolved upon this court.

It is, however, claimed by the plaintiff that the power to appoint a trustee devolves upon the court, only when there is no trustee in existence who can execute the trust; and that such not being the condition of affairs in respect to this trust, Oliver Bronson, one of the trustees, still surviving and capable of executing the trust, nothing devolved upon this court.

But it is to be observed, that Hill on Trustees, at page 188,

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lays down a different rule. He says: "That there is no doubt that where the donees of the power (referring to the power to appoint new trustees to fill vacancies) neglect to exercise it, on the occurrence of any vacancy, equity, under a proper application, will interpose, and itself make the appointment, although this will only be done where the number of trustees is so reduced as to render a new appointment actually necessary as where the number is lessened to one-third."

And again, at page 190, he says: "Whenever circumstances render it necessary or desirable to appoint new trustees, the court of equity, in the exercise of its inherent jurisdiction, will interpose upon proper application and make the appointment."

This jurisdiction exists, and will be equally enforced, whether the instrument creating the trust does or does not contain a power to appoint new trustees. No person interested could be advised to rest satisfied with the appointment of a new trustee under a power, unless the terms of the power clearly and distinctly authorized the appointment in the particular event which may have occurred. If there be the slightest doubt as to the validity of the application of the power to the case in question, the appointment, for the security of all parties, should be made only under the sanction of the court.

It would thus appear that the exercise of the power of appointment of new trustees by the court is not limited to those cases in which there is no trustee to execute the trust, but that the court has the right to exercise that power whenever the circumstances of each particular case seem to require its intervention, and necessarily the court itself is the sole judge as to when such an exigency has arisen. Therefore, it seems to me, that the court having determined that the circumstances of this case required that the vacant trusteeship should be filled, that decision could only be reviewed upon an appeal, taken in the proceeding in which it was made.

There is another ground upon which the defendants Willet
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Bronson and John J. Townsend claim to support the validity of their appointment, and that is, that the plaintiff, Mary Bronson, consented thereto.

It has been shown, I think, that the court had the power to make the appointment, and even if the more orderly way of making such appointment would have been by bill, it is difficult to see how Mary Bronson, after having formally consented that the appointment should be made as it was made, can now retract that consent. She has admitted the right of the court to make the appointment, and by her consent to the appointment has testified to its advisability, and that it was proper that the court should act. Even if the court, except upon regular bill, would not have had the right to make this appointment, as far as she is concerned, she has waived that irregularity by her consent.

The next question which it is necessary to consider, is: Even if this court had the power to fill the vacancies caused by the deaths of Arthur and Frederick Bronson, could it do so upon petition?

It is claimed that the only power possessed by courts of equity, since the Revised Statutes, in the matter of appointment of trustees to fill vacancies, are those defined by the statute, and that no power is conferred by the statutes to do what was attempted here.

I have been unable to find any foundation for the claim that the concluding articles of the Revised Statutes on uses and trusts either did limit, or were intended to limit in any manner, the general undefined jurisdiction of the court of chancery in the matter of trusts. But rather they would seem to have been intended somewhat to enlarge the powers already existing in the court.

It is to be noticed that the phraseology of sections 69, 70 and 71 is somewhat peculiar. Section 69 authorizes the court of chancery to accept the resignation of any trustee upon petition. Section 70 provides that the court of chancery may remove any trustee upon the petition or bill of any person

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interested in the execution of the trust. And section 71 provides that the chancellor shall have full power to appoint a new trustee in place of a trustee resigned or removed. There is no provision contained in the statutes authorizing the appointment of any trustee in any case by petition. And the revisers never could have intended that a trustee could be removed summarily by petition, and that the chancellor should have no power to fill the vacancy in the same summary manner.

It is true that *In re Van Wyck* (1 Barb. Ch. R., 565), the chancellor has said, independent of the statutes on the subject, the court of chancery had no power, upon mere petition, to discharge a trustee or to accept his resignation and appoint another in his place, without the consent of all the parties who are, or who, upon any future contingency, may be interested in the execution of the trust, and that the usual course of proceeding for the purpose of changing a trustee is by bill, to which all persons interested should be made parties, either actually or constructively. But this language would seem to be at variance with the actual practice in the court of chancery. In the case of *Hawley agt. Ross* (7 Paige, 103) the court of chancery did appoint a new trustee by petition.

In the case of *Millbank agt. Crane* (25 How. Pr. R., 193), the identical question now presented for consideration seems to have been decided.

In that case, the sole surviving trustee having died, the defendants were appointed trustees in his place, upon petition, and that action was brought to procure their removal upon the ground, among others, that the court had no power to appoint new trustees upon petition. It was held in that case, that upon the death of a sole surviving trustee of an express trust, the trust vests in the supreme court, and it is the duty of the court to appoint another person as trustee to complete its execution.

The proper mode of appointment of the new trustee being necessarily summary, it was held to be by application by petition, and not by formal bill.

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It was further held, that the notice or summons was not in the nature of process to bring the party into court, consequently the appointment of the new trustees was valid, even if it should be thought to be irregular or even imprudent and indiscreet to make it without formal notice to and summons of those interested.

Mr. justice ALLEN, in his opinion in that case, says: "The proceedings for the appointment of a new trustee, and the execution of the trust were necessarily summary and not by formal bill." An action, with all its delays and expense, would have been out of place. The duty to appoint a trustee is imperative, and the court had simply the exercise of a discretion in the selection of a suitable person and the taking the requisite security. The court, by the death of a sole trustee, became trustee, and the person appointed was its agent to carry out the trust under its direction. It may well be that, but for the statute authorizing a summary application by petition, the orderly way for the removal or change of a trustee would be by bill, but not so where there is no trustee, but one is to be appointed by the court to fill the vacancy. The proceeding by petition was regular and in the usual course.

It thus appears to have been expressly decided, in the above case, that, where the duty of appointing a trustee has devolved upon the supreme court, the appointment may be made summarily by petition, and not by bill; therefore, in the case at bar, it having been shown that the court had the power to fill the vacancies occasioned by the death of Arthur and Frederick Bronson, the appointment of the new trustees by petition was regular.

- This brings us to the consideration of the third ground upon which the plaintiff has based her claim for relief as against the defendant Townsend, viz., that the said Townsend has so misconducted himself in the matter of said trust, that he should be removed therefrom.

In the consideration of this question, I shall not attempt to discuss, in detail, the particular charges made against Mr.

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Townsend, but only their general character. It must, however, be borne in mind that this suit was not prompted by any difficulties which the plaintiff had had with Mr. Townsend, or by any embarrassments which she had experienced by reason of the manner in which the trust was administered; but that the suit was brought solely because of the differences which had arisen between Mr. Townsend and his co-trustees, and because of the representation made to her, by Oliver and Willet Bronson, that it was necessary that Townsend should be ejected from the trust, and that that could only be done by having a suit brought in her name.

These differences between Mr. Townsend and Oliver and Willet Bronson arose entirely because of the claim upon the part of Townsend of the right to charge the trust estate with office rent and clerk hire.

During the administration by Frederick Bronson of this trust he had been accustomed to charge to the estate, in addition to office rent and clerk hire, five per cent for his commissions, which was clearly illegal, as his charge for commissions was greatly in excess of the amount allowed by statute; and although this had been done for a long series of years without objection, Dr. Oliver Bronson, when the trust devolved upon him by reason of the death of Frederick Bronson, determined that it should not continue.

Accordingly, when the appointment of Willet Bronson and Mr. Townsend was first discussed, it was distinctly understood that none but legal charges should be made against the trust estate. With this understanding in respect to charges, in February, 1869, Willet Bronson and Mr. Townsend were appointed trustees. From the time of this appointment down to at least the summer of 1869, and perhaps later, the trust estate, with the assent of all the trustees, remained in the same office in which it had been administered by Frederick Bronson, and its books were kept by the same clerks, and the business generally was conducted in the same manner as had been done by him.

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About this time Mr. Willet Bronson came to the conclusion, and so advised Dr. Oliver Bronson, that trustees had no power or authority to employ a clerk for the purpose of keeping the books of the estate at the expense of the estate; and he insisted that Mr. Townsend should not make any charge against the estate for clerk hire or office rent, basing this demand upon the alleged agreement of Mr. Townsend to make none but legal charges. Mr. Townsend, upon the other hand, claimed that the trustees of an estate, of the magnitude of this one, had the right to employ a clerk for the purpose of keeping the books; and he accordingly charged, as had been previously done by Frederick Bronson, a certain sum to the estate for clerk hire and office rent.

Mr. Willet Bronson construed the agreement made by Mr. Townsend prior to his appointment, that none but legal charges should be made against the estate, into an agreement that no charge should be made against the estate for its administration, except the legal commissions of the trustees; and hence objected strenuously to the charge for office rent and clerk hire, made by Mr. Townsend.

The differences which arose between Mr. Townsend and Willet Bronson culminated in a demand by Willet Bronson, concurred in by Dr. Oliver Bronson, for a surrender of the books of the trust to Mr. Willet Bronson, which was refused by Mr. Townsend.

The subsequent events and misunderstandings between Mr. Townsend and Mr. Willet Bronson, prior to the commencement of this action, I do not think it at all necessary to notice, because they arose entirely out of the position which Mr. Willet Bronson took in respect to the charge for office rent and clerk hire, and that which Mr. Townsend took in reference to the custody of the books, neither of which can be sustained.

It is very clear that Mr. Willet Bronson was mistaken in supposing that trustees of an express trust, of the magnitude of the one now under consideration, had no power to employ

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a clerk at the expense of the trust estate (*Hawley agt. James, 5 Paige, 318*); and Mr. Townsend was correct in supposing that such an expense would be justifiable. Indeed, the greater part of the amount of the charges for office rent and clerk hire, which were so strenuously objected to by Dr. Oliver Bronson and Mr. Willet Bronson, and because of which Mr. Willet Bronson charged Mr. Townsend with dishonesty, were incurred with the express sanction of Dr. Bronson and Willet Bronson, and Mr. Townsend was not in the slightest degree guilty of any breach of faith in making them.

But I think that the refusal of Mr. Townsend to deliver the books and papers to Mr. Willet Bronson, upon the joint demand of Dr. Oliver Bronson and Mr. Willet Bronson, cannot be sustained.

It seems to me to be, beyond all question, the right of a majority of trustees to determine in the manual custody of which of them the books and papers of the estate shall remain, and the only way that any trustee could justify a refusal to obey the wishes of the majority in that respect, would be by showing that he had reasonable ground to suppose that the estate would suffer loss thereby. It was but natural that Mr. Townsend should, with great reluctance, see the administration of the estate taken from the hands which had administered it for so many years, to the satisfaction of all parties interested, including Dr. Bronson himself. And I can further see how that reluctance would be increased by the knowledge that the demand for the removal of the books and papers from the custody in which they had remained so many years was founded upon an erroneous idea of the law, in respect to the rights of trustees to employ a clerk and charge the expense thereof to the estate.

But none of these considerations can justify the refusal of Mr. Townsend to respect the wishes of a majority of the trustees. If one of the trustees was willing to do the clerical work of keeping the books without expense to the estate, and the majority of the trustees wished that he should do so, they

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had clearly the right to have the trust administered in that way.

Although it has been charged in the complaint that Mr. Townsend has excluded Dr. Oliver Bronson and Mr. Willet Bronson from all control or management of the trust fund, and from all participation in the same, I do not think that the evidence sustains that allegation. Neither do I think that the refusal of Mr. Townsend to deliver to Willet Bronson the books, papers, &c., of the trust estate, although unjustifiable, furnishes sufficient ground for the removal of Mr. Townsend. Neither do I think that the differences which have arisen between the trustees are of such a nature as to prevent the due administration of the trust estate; these differences have arisen from a misconception by Willet Bronson of the legal powers of the trustees, and resulting in the assumption by Mr. Townsend of a position in respect to the manual custody of the books, papers, &c., of the estate, which cannot be defended.

The only remaining question to determine is: To whom do the accumulations of the trust estate belong?

In his original will, Isaac Bronson provided that the shares allotted to each of his daughters should remain in the possession of the trustees, and remain their estate at law during her natural life, and that the interest, rents, issues and profits only thereof should be paid to her, as they accrued, during her natural life; and that they should not be at the control of her husband, or subject to his debts, but be to her sole and separate use; and that, on her demise, her portion should be conveyed and delivered to her issue, to be and belong to such issue for ever.

In the codicil to his will, bearing date March 30, 1838, after reciting that the codicil was made because he was desirous of making alterations therein, that the same might be more conformable to existing laws, provided that the interest, rents, issues and profits of that portion of his estate which should be allotted to any one of his daughters, as directed in the

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fifth article of his will, should, by said trustees, be applied to the sole and separate use of each daughter, respectively, for whom the same should be holden in trust, and should be exempt from the control and debts of her husband; and, on receiving a receipt or discharge of any *cestui que trust*, executed under her hand to them, acknowledging a sum applied to her use, said trustees should be absolved from any further obligations, in any way or manner, to pay the same sum.

In the next section he makes some further provision in case of the death of any of his daughters without issue, in respect to the division of her portion.

It will be observed that the testator has nowhere, either in his will or in the codicil thereto, provided for or made any distribution of any accumulations.

In his will he provided that the interest, rents, issues and profits of the portion which should be allotted to any one of his daughters should be paid to her as they should accrue, during her natural life, and then provides, in case of her decease, what shall be done with her portion, evidently referring to the portion of his estate which had been allotted to her.

This will was made prior to the time when the Revised Statutes went into effect. His codicil was made in the year 1838, some time after the Revised Statutes took effect; and, undoubtedly, Isaac Bronson had been advised that the provisions of his will were not in conformity with the requirements of the Revised Statutes, and he, therefore, made the codicil above named in order that the provisions of his will might be made to conform thereto.

If, therefore, upon an examination of the will and this codicil, we should come to the conclusion that it was the intention of the testator that the rents, issues and profits of the portion allotted to any one of his daughters should belong to her absolutely, such intention must control the determination of the question now under consideration.

I am unable to see how it is possible, after an examination

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of the provisions of this will and codicil, to come to any conclusion other than that such was the testator's intention. In his will he provides that the rents, issues and profits of each daughter's portion shall be paid to her as they accrue, and upon her death he disposes of nothing but the portion of the daughter, making no allusion whatever to accumulations; in fact, there could be no accumulations if the terms of his will were complied with, and the income of the daughter's portion were paid over as they accrued, as the will directed.

An examination of the codicil, in respect to the daughter's portion, will show that the trustees, although directed to apply to the sole and separate use of each daughter the income of her portion, were not expected to attend personally to such application, because the receipt of each daughter, acknowledging a sum applied to her use, completely absolved the trustees from any further obligations in respect to said sum. And, also, it will be observed that the codicil is equally silent with the will as to any accumulations, although exceedingly precise as to what shall be done with the original share or portion, upon the decease of any of his daughters.

I am clearly of opinion, from these circumstances, that the testator undoubtedly intended that the whole of the income of the portion of his estate allotted to each daughter should belong absolutely to her, to be disposed of as she saw fit.

It has been urged in this case that the evidence shows that the plaintiff is of a weak mind and incapable of managing so large a sum as had been allowed to accumulate; but the answer to the suggestion is, that our statutes have provided but one way in which a person can be deprived of the management of his property, and this court has no power or authority to pass upon the question of the ability of the plaintiff to manage her affairs. I think, therefore, that the sums which have been allowed to accumulate in the hands of the trustees, of the income of her portion of her father's estate, belong absolutely to her, and form no part of the trust estate, and that she is entitled to receive the same upon presenting to

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the trustees a receipt in form prescribed by Isaac Bronson in the first codicil to his will.

The conclusions, therefore, to which I have come, upon the questions submitted to me for decision, are :

First. That the supreme court had the power to appoint such persons as they saw fit to fill the vacancies caused by the death of Arthur and Frederick Bronson.

Second. That it was in accordance with the practice of this court, and of the court of chancery, to make such appointment upon petition.

Third. That Mr. Townsend has not been guilty of such misconduct as calls for his removal from the trust.

Fourth. That all the income derived from the plaintiff's portion of her father's estate, and which has been allowed to accumulate in the hands of the trustees, belongs to her, and she is entitled to claim the payment of the same to her by the trustees, upon presentation of a proper receipt therefor.

Judgment is ordered accordingly.

Powers agt. Trenor.

SUPREME COURT.

POWERS agt. TRENOR.

Motion to set aside judgment of foreclosure, for irregular appearance of attorney.

Where merits are shown, and the insolvency of the attorney may be inferred, the court will let in the defendant on the merits, on a motion to set aside a judgment of foreclosure.

Where the right claimed by the defendant to have the service and judgment set aside without terms, it appears that the right of merits is against the defendant, his motion will be denied.

New York, at Chambers, October, 1874.

MOTION to set aside judgment of foreclosure for irregularity.

DONOHUE, J.—This motion is made, on behalf of the defendant, Trenor, to set aside a judgment in foreclosure. The sole ground of the motion is, that there was no service on or appearance for the party. It is not denied that there was an actual appearance by attorney, but it is claimed the attorney was not authorized. The court will not, on this motion, as a matter of right, on the part of the defendant in default, look behind the appearance. It will, where merits are shown, and insolvency of the attorney may be inferred, let in the defendant on the merits; but on the motion he puts his claim on no such ground. He insists on the right to have the court set aside the judgment, regular on its face, and leave the plaintiff to make a new service on the merits of the appearance. I think the willful misstatement of the defendant's son, that he never authorized an appearance, met by his

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written authority, shows an entire bad faith on his part, tainting the whole merits of the motion. So far as the merits of the motion are before the court, in aid simply of the right claimed by the defendant to have the service and judgment set aside without terms, the right of merit is against the defendant; his denial of the execution of the mortgage, met as it is, seems to imply an equal forgetfulness as evinced by his son.

Motion denied.

Globe Mutual Life Insurance Co. agt. Reals.

SUPREME COURT.

GLOBE MUTUAL LIFE INSURANCE COMPANY agt. ADDIE REALS
*et al.**Cancellation of policy of insurance obtained by fraud—jurisdiction—demurrer.*

A court of equity has jurisdiction to order a surrender and cancellation of a policy of insurance alleged to have been obtained by fraud, and held by the promisee, upon which no action has been brought.

Whether the power of the court shall be exercised belongs to the trial of the case, rather than a preliminary examination of the complaint alone upon demurrer.

The exercise of the power of the court of equity depends upon a sound discretion, applicable to all the circumstances of the case made by the proofs, when the case is fully before the court.

Onondaga Special Term, December, 1874.

DEMURRER by the defendants to a complaint by the plaintiff, stating that its policy of insurance was obtained from it by the fraud of James H. Reals, upon whose life it was issued, in complicity with the defendant Fowler, for the benefit of Reals' widow and children, defendants. The defendants demur, for the stated grounds: (1), that the court has no jurisdiction of the subject of the action; (2), that the complaint does not state facts sufficient to constitute a cause of action.

Robert Sewell, for plaintiff.

Hiscock, Gifford & Doheny, for defendants.

HARDIN, J.—The facts stated in the complaint are sufficient to confer upon a court of equity jurisdiction and power to give the relief asked (*McHenry* agt. *Hazard*, 45 N. Y., 580; cases cited in the opinion of *ANDREWS, J.*).

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If the plaintiff's right to relief was apparent upon the face of the instrument referred to in the complaint, then the question would belong exclusively to the law side of the court. But facts *aliunde* the papers must be given in evidence to entitle the plaintiff to the relief demanded (40 *N. Y.*, 164).

Where those facts shall be given in connection with the papers, then the parties can present their respective rights to the discretion of a court of equity, to be disposed of in accordance with the settled rules of equity, and the practice in such cases. After the facts are all out, the court, for reasons suggested in respect to the merits, may dismiss the complaint absolutely, or without prejudice, because the case may then, to the court, seem more appropriately to belong to the law side (*Ins. Co. agt. Bailey*, 13 *Wallace*, 616).

It is to be observed that, in deciding the case last cited, CLIFFORD, J., remarks that, "where the cause of action is a purely legal demand, and *nothing* appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a federal court."

In that case an action at law had been commenced, and an opportunity afforded thereby to test the same question made on the merits in the action at law as in the suit in equity. Besides, the statute of 1789 provides that no suit in equity shall be sustained when there is a remedy at law.

So, too, in *Savage agt. Allen* (54 *N. Y.*, 458), it appeared that an action had been brought where the same matters stated in the complaint in the second suit might have been stated in the first suit, by way of defense.

In this case there is no statement before the court to show that any other action is pending between the parties upon the matters embraced in the complaint. The defendants can set up the policy and allege its validity, and counter-claim upon it, and ask in this action an affirmative judgment.

The propriety of a jury trial upon such a case can be con-

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sidered by the court, and if the interests of the parties require a jury trial, the court has power to order the issues to be heard by a jury (*Clark* agt. *Oswego Ins. Co.*, *MS. opinion of HARDIN, J.*; *Vermilyea* agt. *Palmer*, 52 *N. Y.*, 475). If such order should be made, it would not then be apparent that the defendants Reals would be any worse off by reason of the insurance company being plaintiff and they defendants, instead of *vice versa* (*Wright* agt. *Wright*, 54 *N. Y.*, 443).

The conclusion is reached in this case that a court of equity has jurisdiction to order a surrender and cancellation of the policy of insurance alleged to have been obtained by fraud, and held by the promisee, upon which no action has been brought.

Whether the power of the court shall be exercised, belongs to the trial of the case, rather than a preliminary examination of the complaint alone.

The exercise of the power of the court of equity depends upon a sound discretion applicable to all the circumstances of the case made by the proofs, when the case is fully before the court (45 *N. Y.*, 581; *Mills* agt. *Bliss*, 55 *N. Y.*, 143).

The demurrer must be overruled, with leave to answer within twenty days, costs being paid.

Johnson agt. Reeves.

SUPREME COURT.

ALEXANDER T. JOHNSON agt. CHARLES H. REEVES.

Conveyance of real estate for the benefit of minor children — power in trust.

Where a man conveys his real estate to his four minor children by deed, with full covenants of warranty, "reserving to himself the entire and exclusive use, benefit and control of said premises during his natural life, and reserving also to himself the power to dispose of said premises or any part thereof, by a deed executed in the name of the parties of the second part, or in his own name alone, in trust, nevertheless, and for the benefit of the said parties of the second part, and to hold the purchase-money in trust for their use, or to loan it upon good securities during his life, thereby securing to them the principal sum at his death, retaining the interest for his own use and benefit," and subsequently a conveyance is made of a portion of the premises by him, in his own name, to a third person:

Held, that such conveyance is sufficient to convey a fee simple of the premises. If not good as an express trust vested in the grantor, it can be upheld as a power in trust under the statute.

Orange Circuit, January, 1875.

THIS action was brought February 20, 1874, to recover the balance due upon a contract made by the parties September 23, 1865, for the sale of certain lots of land in the village of Port Jervis, Orange county, N. Y. The defendant made the first payment on the contract and declined to pay any more, alleging that the plaintiff could not give a good title for the premises. He went into possession, and continued therein up to the time of the trial.

On the 13th day of September, 1856, one John M. Ridgeway, who was the owner of certain premises in Port Jervis, and who is now living, in consideration of love and affection,

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conveyed the same to his four infant children. The deed contained the usual full covenants of warranty, and this reservation :

"Reserving, nevertheless, to the said John M. Ridgeway the entire and exclusive use, benefit and control of said premises during his natural life, and reserving also to the said John M. Ridgeway the power to sell and dispose of said premises or any part thereof, by a deed executed in the name of the parties of the second part, or in the name of the said John M. Ridgeway alone; in trust, nevertheless, and for the benefit of the said parties of the second part, and to hold the purchase-money in trust for their use, or to loan it upon good securities during the life of the said John M. Ridgeway, thereby securing to them the principal sum at his death, retaining the interest for his own use and benefit." The wife of Ridgeway joined in this deed, and the same was duly recorded in the clerk's office of Orange county, September 17, 1856.

On the 18th day of October, 1858, said Ridgeway, in consideration of \$1,000, conveyed a portion of said premises so deeded to his children to the plaintiff, and the premises so contracted to be sold by said plaintiff to the defendant are a part of the same. Before bringing his action, the plaintiff tendered a deed to the defendant, in accordance with the terms of the contract, and demanded the balance due thereon. This the defendant declined to pay, and refused to accept the deed, alleging that the plaintiff could only convey the life estate of John M. Ridgeway in the premises; that if he would give him a perfect title he would pay willingly.

The case came on to be tried at a circuit court held at Goshen, January, 1875, before justice BARNARD, without a jury.

A. C. Niven and C. E. Cudderback, for plaintiff.

B. R. Champion, for defendant.

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BARNARD, J. — Without passing upon the technical question raised by the plaintiff, that the defendant cannot raise the question of title as long as he remains in possession of the premises, I proceed to consider the case on its merits. It was undoubtedly the intention of Ridgeway, when he executed the conveyance of the premises to his children, to reserve to himself a power of sale in his own name, for their benefit, and the deed should be construed according to that intention, unless inconsistent with the rules of law. This right to convey in his own name must be construed as if a separate deed had been given to him by the children, granting him the power to convey on their behalf and for their benefit. It is not inconsistent with the grant, although covenants of warranty are employed therein; and if not good as an express trust, it is to be upheld as a power in trust, under the statutes relating to powers. This being the case, the deed tendered by the plaintiff to the defendant was sufficient, as it conveyed to the defendant the premises in question in fee simple, free from incumbrances, and I order judgment accordingly for the plaintiff for the full amount of his claim with costs.

Satterthwaite agt. Vreeland.

SUPREME COURT.

J. FISHER SATTERTHWAITE, respondent, agt. GEORGE VREELAND
and others, appellants.

Broker's commissions on sale of real estate, when not allowed.

Where, by a contract with the owner of real estate, the broker is bound to sell at a given price and within a limited time, if he does not sell for that price and within that time the contract is at an end, and the owner may then sell the property to a purchaser procured by the broker, at a less price and free from the broker's commissions.

First Department, General Term, October, 1874.

APPEAL from judgment and from order denying motion for new trial, made upon the minutes of the justice holding the circuit.

John Chetwood, for appellants.

F. R. Coudert, for respondent.

DANIELS, J.—The plaintiff recovered a verdict for commissions on the purchase-price of a farm of 115 acres, conveyed by the defendants to Samuel W. Torrey, for the consideration of \$1,200 an acre. It had been in the plaintiff's hands, as a real estate broker, for sale, previous to the time when the defendants finally sold it, and his evidence was that it remained in that condition when the sale was made. But, according to his own statement, his employment was to sell at a particularly specified price, which was changed during the time he

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was employed, but never reduced to \$1,200, the sum per acre for which the sale was finally made. The price at which he was first empowered to sell was \$1,500 an acre, and, on the 25th day of September, 1869, that was reduced, by a written option for ten days, to the sum of \$1,385 an acre; and, on the 21st day of July, 1870, the option was revived and extended, in writing, for the period of thirty days. These were the only changes shown upon the trial in the price for which the plaintiff was authorized to sell the farm, and no sale was agreed upon, and no purchaser procured who was willing to purchase the farm at either of those prices.

From these facts, which are shown by the evidence which the plaintiff himself gave as a witness, he had no authority, at any time, to contract for the sale of the farm at a less price than \$1,385 an acre. That was the lowest sum for which he was ever authorized to make the sale; and his right to sell for that, or for anything less than the price of \$1,500 an acre, the price originally fixed, was extinguished by the expiration of the thirty days for which the option was extended, before the defendants sold it to Torrey for \$1,200 an acre.

A sale for the price at which the plaintiff was empowered to sell was in the nature of a condition, on which his right to commissions was, by the terms of his employment, rendered dependent. If he procured a purchaser for either of such sums during the time in which he was at liberty to accept the one or the other, then his commissions would be earned, and a right of action created for their recovery. But until he did that, as long as he was not interfered with during the period fixed within which the sale could be made for the smaller sum, no such right accrued to him. To maintain a claim by him for his commissions, it was necessary that he should be able to show that he had either procured a purchaser for the property at the price he was empowered to sell, or that the defendants had deprived him of the opportunity to do so while the privilege of selling for the smaller sum continued to exist. For, by the unwritten or general employment, no

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time whatever was fixed or designated during which the plaintiff was authorized to sell at \$1,500 an acre. That bound the defendants, as owners, for no particular period of time, and for that reason it could not prevent them from making a *bona fide* sale of the farm at a less sum, in case they elected to do so, without incurring any liability for commissions to the plaintiff. All that he was entitled to under that employment was a reasonable opportunity to find a purchaser at \$1,500 an acre. And after he had failed to do so, and proved unable to sell for the smaller sum during the period specified for that purpose, the defendants were at liberty to sell for less, without becoming liable to the plaintiff for commissions. That resulted directly from the terms of the employment, and their right to dispose of the property owned by them. They in no manner abridged or restrained their own right to sell unless the plaintiff could sell for one or the other of the prices he was authorized to receive under the terms of his employment. By making a sale on such terms while the authority continued, he would become entitled to his commissions; but as he failed to do that, no right to them was created. Such were the plain terms of his employment, and as long as he failed to perform them, the defendants were under no obligation to pay him what they had agreed to, only as a compensation for performance. That was the import of the contract under which he was employed, and the propriety of the consequence deduced from it is sustained by authority (*Jacobs agt. Kolff*, 2 *Hilton*, 133; *Holley agt. Townsend*, 16 *How. P. R.*, 125; *Barnard agt. Monnot*, 33 *id.*, 440; *Doty agt. Miller*, 43 *Barb.*, 529; *Briggs agt. Rowe*, 4 *Keyes*, 424). These cases, as well as those relied upon by the plaintiff, require that the broker shall find a purchaser at the price for which he has been authorized to sell, where a specific price may be fixed, before he can lawfully demand his compensation, when he has not been prevented from doing so by any improper interference of the owner during the time in which he was allowed to affect the sale. The relation is one of contract,

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requiring the application of the same legal principles as control the rights of parties under other similar agreements.

The plaintiff not only did not sell for either of the prices designated, but beyond that it did not appear that there was the least probability of his ever doing so; and as long as that was the case, and by the general terms of his employment no time was fixed during which he could have the privilege of selling after the last written option expired, the defendants themselves were under no obligation preventing them from selling their farm for a lower price, as that was not a mere device to avoid the payment of the plaintiff's compensation; and that it was not a device of that nature was clearly shown upon the trial. For Torrey, who was called as a witness and examined on the plaintiff's behalf, testified that he positively refused to buy the farm of the plaintiff at the lowest price for which he was authorized to sell; and that of his own motion he afterward applied to and negotiated with the defendants for its purchase, and finally obtained it at the price of \$1,200 an acre, which was \$185 less per acre than the smallest sum at which they authorized the plaintiff to sell it. This evidence was uncontradicted, and as long as it was in no respect improbable, neither the court nor the jury was at liberty to reject it as unworthy of belief (*Newton agt. Pope*, 1 *Cowen*, 109; *Dolsen agt. Arnold*, 10 *How. P. R.*, 528; *Somer agt. Meeker*, 25 *N. Y.*, 361; *White agt. Stillman*, *id.*, 541).

The evidence was insufficient to warrant a verdict in the plaintiff's favor, and the defendants' motion for a new trial ought, for that reason, to have been successful. This particular point was not presented on the motion for a nonsuit, nor in any request made to charge; and, as it is the only one on which the plaintiff's case was defective, and the legal theory of the charge was correct, the relief to which the defendants are entitled is to have the verdict set aside.

The order appealed from should, therefore, be reversed, with costs of the appeal to abide the event, and a new trial

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ordered, on payment by the defendants of the plaintiff's costs and disbursements on the trial already had.

DAVIS, P. J., and LAWRENCE, J., concurred.

NOTE. — This seems to be a pretty close case. See the case of *Susdorf* agt. *Schmidt* (55 N. Y., 319), where CHURCH, C. J., says: "The undertaking of the broker is to make efforts to procure a purchaser, but if he fails he is entitled to no pay unless there is a special contract. But if the purchaser is found by his efforts and through his instrumentality, he is entitled to compensation, although the owner negotiates the sale himself (51 N. Y., 124)." See also *Mooney* agt. *Elder* (56 N. Y., 238). Here Torrey was the purchaser procured by the broker, who negotiated with the defendants, the owners, for the purchase of the property at a less sum than the plaintiff was authorized to sell it for. The plaintiff, therefore, being the procuring cause of the sale, it would seem unjust to deprive him of his commissions. —[REF.]

Childs agt. Connor.

NEW YORK SUPERIOR COURT.

DANIEL B. CHILDS, as Assignee of MICHAEL CONNOR, plaintiff
and respondent, agt. BRIDGET CONNOR, MICHAEL CONNOR
and JOHN SWEETMAN, defendants and appellants.

Conveyances of real estate, made with alleged intent to defraud creditors.

By the Revised Statutes (2 R. S., 137), no conveyance or charge shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration.

If it appears from the evidence and circumstances that a conveyance of real estate made by the husband to his wife was a reasonable and proper provision for the wife, and that her property had been employed in the purchase of it by her husband, and that in equity she was his creditor, and that in the condition of her husband's estate at the time there was nothing more in the transaction than what was just and fair as a settlement for her, the conveyance cannot be invalidated by his subsequent inability to pay a debt then existing.

General Term, January 4, 1875.

THE conveyances in controversy were executed on the 28th day of April, 1870. The court found that the defendant Michael Connor was at that time indebted to one John Post and one David C. Carpenter, and that one Gibbons preferred a claim against him in tort for \$2,500, and that by reason of the conveyance Connor became unable to pay his debts in full, and was rendered insolvent. Subsequently the court found, at the request of the defendants, that the only creditor who held an unsatisfied claim against Michael Connor, at the time of the conveyance, April 28th, 1870, was John Post.

A. P. Hinman, attorney for defendants and appellants.

King & Meyer, attorneys for plaintiff and respondent.

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CURTIS, *J.*— This subsequent finding accords with the evidence. The claim for the tort had been compromised for \$150, and arrangements made for its extinction in weekly payments, by which it was subsequently mostly, if not entirely, paid, and found by the court to be paid. The indebtedness to Post appears to be made up of a note of Michael Connor's for \$150, that Post bought of one Carpenter, and the balance of an account between Post and Connor, made up to October 9, 1871, and extending from May 11, 1869, amounting to \$309.54, as claimed by the plaintiff. The testimony is obscure in reference to the note for \$150, given by Connor to Carpenter, and it does not appear to have been in existence until after the conveyances were executed. Post sold Connor, who was a blacksmith, at frequent intervals, bundles of iron, on credit, receiving sums from time to time in payment.

In this way he sold to Connor, up to the time of the making of the conveyances, iron amounting to \$530, and subsequently, up to October 9, 1871, when he ceased to credit him, additional iron amounting to \$401. From the figures given in the evidence, there appears to have been, at the time of the conveyance by Connor, April 28, 1870, a balance due Post of \$140 or thereabouts, and between that time and the 9th of October, 1871, Connor paid the plaintiff \$375.54, including \$55.54 in old shoes. The evidence fails to show that this balance of \$140 due to Post at the time of the conveyance was not extinguished by the amounts shortly after paid by Connor to Post, and in all amounts to \$375.54.

It would thus appear that if there was any indebtedness to Post when Connor conveyed the lot it was very trivial, and the question arises whether this conveyance was made with the intent to defraud creditors, and should be set aside. The evidence shows that the defendants, Connor and his wife, were very ignorant but industrious people—he working at his trade and doing a good business, and she keeping boarders and making dresses—and by their joint savings buying the lot in question. The deed was taken in his name, though

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the money in part was her property that was applied toward paying for it. She became discontented with the arrangement, and when the action was brought or threatened for the tort, claiming heavy damages, the conveyances in controversy were executed, transferring the property to her.

If he was at this time solvent, and this was done, as she claims, as an act of justice to her, and to provide for her and her children, it presents a case deserving of consideration. It is in evidence, and uncontradicted, that at this time Connor's business was prosperous, and that he had other property and two horses worth \$950, or which he subsequently sold for that sum. He had compromised the claim for the tort, and owed, if any sum whatever, not to exceed \$500; and the evidence fails to show that he had any adequate motive for attempting to commit a fraud. It is in evidence that about two years after the transfer of the lot, Connor fell sick, and competition set in and his business ran down. His wife has ever since been in possession of the lot, and paid the interest upon the mortgage upon it.

By the Revised Statutes it is declared that no conveyance or charge should be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration (2 *Rev. Stat.*, p. 137, *paragraph 4*).

The question is one of fact; and if the circumstances show that the conveyance was a reasonable and proper provision for the wife, and that her property had been employed in the purchase of the lot, and that in equity she was the creditor of her husband, and that in the condition of the husband's estate at the time there was nothing more in the transaction than what was just and fair as a settlement for her, the conveyance could not be invalidated by his subsequent inability to pay a debt then existing (*Babcock agt. Eckler*, 24 *N. Y.*, 623; *Baldwin agt. Ryan*, 3 *Sup. Ct. Rep.*, 251).

Upon a careful consideration of the evidence, there appears to be no motive disclosed to induce the defendant Connor to seek to defraud creditors by this transfer. There is an entire

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failure of proof that he was insolvent or unable to pay all his debts, which, if any, were insignificant in amount at the time. The conveyance to the wife was a proper provision to her; and in view of the fact that she had contributed toward the original purchase, and had always claimed that the lot should be held as a provision for her and her children, it was no more than a reasonable and just and prudent act on the part of the husband.

In this view of the case, it becomes unnecessary to consider the question raised by the appeal from the order granting the allowance of \$150 to the plaintiff; but it is difficult to see how, in any contingency, more than five per cent could be granted upon the amount of plaintiff's judgment for \$627.92 against the defendant, the payment of which he seeks to recover from the property in question. This substitution of Daniel B. Childs, as assignee in bankruptcy of Michael Connor, as plaintiff, on the 23d of May, 1874, cannot enlarge the amount of the claim or subject-matter involved.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

MONELL, C. J., concurred.

McGuire agt. People.

SUPREME COURT.

CHARLES MCGUIRE, plaintiff in error, agt. THE PEOPLE,
defendant in error.

When writ of error frivolous — examination of witness.

Where the question put to a witness is a proper one, and no objection made as to the answer, it not tending to connect the plaintiff in error with the offense charged, the writ cannot be sustained.

Where the cross-examination of a witness upon one subject has been unreasonably protracted, and a question is put which has no bearing upon the issue or upon the credit of the witness, the cross-examination may be closed, in the sound discretion of the court.

First Department, General Term, October, 1874.

WRIT of error to the court of general sessions, on a conviction for rape.

William F. Howe, for plaintiff in error.

B. K. Phelps, district attorney, for defendant in error.

BARRETT, J. — The plaintiff in error was jointly indicted with one Campbell for rape. Upon the trial, a witness was asked what McGuire said in the police court, when the charge was made by the complainant. The witness answered that McGuire made no reply, but that Campbell did, in McGuire's presence. He was then asked what Campbell said. No objection was interposed to this question, and the witness answered it. After the answer had been given, the prisoner's counsel stated that he objected "to the conversation," but did

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not state upon what grounds, nor did he ask to have the answer stricken out, or disregarded by the jury. The court remarked that the question (which had not been objected to) was competent, to which remark there was no exception. Thereupon, the same question was repeated by the district attorney, in another form, and objected to as leading, whereupon the question was withdrawn and put in proper form. When so put, no objection was interposed, nor any remark made as to the answer which followed.

Anything more frivolous than the appeal upon this ground it would be difficult to conceive. The question itself was a proper one (*Kelly agt. The People*, 55 *N. Y.*, 565); it was put and answered without objection or exception, and the answer did not tend to connect McGuire with the offense charged, or to prejudice him in the slightest degree.

But one other point is made in the case, and it is equally frivolous. One of the witnesses for the prosecution, after having been cross-examined at great length upon a variety of collateral matters, was finally interrogated respecting his business that evening. Even this the court permitted, and the inquiry was not checked until it was evident that it was being unreasonably protracted. The question — which was finally excluded — “Who was the person you went to see there?” had no bearing upon the issue, or upon the credit of the witness.

How far such a line of cross-examination should be permitted is a matter resting entirely in the sound discretion of the court, and we think that such discretion was wisely exercised in the present instance.

The conviction and judgment should be affirmed.

DAVIS, P. J., and DANIELS, J., concurred.

Holbrook agt. Brennan.

NEW YORK COMMON PLEAS.

FRANCIS W. HOLBROOK, appellant, agt. MATTHEW T. BRENNAN,
Sheriff, &c., respondent.

Execution against a deputy sheriff as the judgment debtor cannot be executed by him.

An execution issued to a deputy sheriff, who is the judgment debtor in the execution, cannot be executed against himself.

It would be absurd to hold that when the sheriff is forbidden by statute to execute process where he is a party, that he may authorize a deputy to execute process against himself; and this he does where he delivers an execution against the deputy to the deputy to execute against himself.

And where in such case the deputy returns the execution *nulla bona*, when it is made to appear that the deputy had property which might have been, during the life of the execution, applied on the execution, the sheriff will be held liable in an action for a *false return*.

General Term, April 5th, 1875.

THIS is an appeal from the judgment of the general term of the marine court of the city of New York, and involves review of two orders, one dated March 25th and one March 26th, 1874. The notice of appeal states the grounds of appeal. The action was against defendant as sheriff, for neglect to levy, and a false return on three executions against property of Patrick Cuff. Two judgments were entered in November, 1871, against Cuff, in the marine court, for about \$110 each.

Execution on first judgment was issued November 2, 1871, and returned May 4, 1872, *nulla bona*.

Execution on second judgment was issued March 9, 1872, and returned May 21, 1872, *nulla bona*. Another execution, issued on second judgment, was issued August 6th, 1872, and returned September 30, 1872, *nulla bona*.

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Patrick Cuff was the sheriff's deputy, and the first two executions were delivered by the sheriff to Cuff, as such deputy sheriff, to perform.

The third execution was delivered to Baird, another deputy.

Plaintiff shows \$400 in a bank check and \$100 in money in Cuff's possession, control and use; also furniture worth \$1,950; also a manuscript (worth \$500 and owned by Cuff), viz., a contract for the sale of land in New York city, during the running of the first execution; also the same manuscript and furniture during the running of the second writ; also the same furniture during the running of the third writ; he also occupied the land during the time of all three writs.

There is no doubt that Cuff was owner of this money, \$100; he did not embezzle it; he borrowed it, and used it in the purchase of his contract, which he afterward sold and assigned and delivered, as *defendant himself* showed, for a consideration.

The sheriff knew Cuff owned this property, because Cuff knew it. No levy, or attempt to levy, was made by the sheriff, or by Cuff as deputy, and Baird made no levy, or attempt to levy, although Cuff's residence was well known in the sheriff's office.

The return of *nulla bona* was false. The damage sustained by plaintiff was the amount of the judgments and interest, \$257.37.

If defendant is not liable for \$257.37, then he is liable in nominal damages for having committed the executions against Patrick Cuff to said Patrick Cuff, the judgment debtor, to levy upon his own property himself.

Charles H. Smith, for appellant.

Excluding answer to question: Did Patrick Cuff, in December, 1871, pay you any money?

This was material, in that it tended to show there was money belonging to Cuff.

A payment is a voluntary parting of money by the owner.

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Money is undoubtedly subject to levy under execution. Such exclusion was in effect based on a ruling that money was not subject to levy, and such ruling was error (*Code*, §§ 298 and 463; *Carrol* agt. *Cone*, 40 *Barb.*, 220; *Baker* agt. *Kenworthy*, 41 *N. Y.*, 216).

I. Admitting evidence of the circumstances under which the contract was made. Evidence is not admissible to explain a written contract between the parties thereto, much less as to third parties. Evidence of those circumstances was immaterial. It was calculated to, and actually did mislead the judge, tending, as it did, to show that Fay was the party to be benefited by the contract, and that Cuff was only a tool. It counterbalanced the evidence that *Cuff paid the money, took the contract in his own name*, and never told Pannes the contract was made for Fay, and requested Pannes to make the deed to Fay (because Cuff was insolvent), and that Cuff took up his residence on the land from that day to this.

II. Admitting the deed which finally passed. It was not material to whom the property was deeded after the executions were issued.

III. Admitting evidence as to whether plaintiff's attorney ever pointed out to the sheriff property of Cuff.

This evidence was wholly illegal and incompetent.

It embarrassed plaintiff's case and misled the judge.

Plaintiff *was not bound* to give notice of or point out specific property to sheriff on issuing execution (*Tomlinson* agt. *Rowe*, *Lalor's Sup. to Hill & Denio*, 410).

Nor was he bound to tender an indemnity (*Curtis* agt. *Patterson*, 8 *Cow.*, 65; *Platt* agt. *Sherry*, 7 *Wend.*, 236).

IV. The improper evidence admitted affected materially the result to plaintiff, as is shown in the opinion of the justice, and is good ground for new trial (*Williams* agt. *Fitch*, 18 *N. Y.*, 546; *Band* agt. *Gillett*, 47 *N. Y.*, 186; *Clark* agt. *Crandall*, 3 *Barb.*, 613; 7 *Wend.*, 193; 21 *Barb.*, 489; 32 *Barb.*; *Tomlinson* agt. *Rowe*, *H. & D. Sup.*, 410).

Each finding proposed is supported by the evidence, and

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the justice erred in making the order, March 26, 1874, declining so to find. A review thereof is by way of appeal from the order, and such appeal is taken (*Heroy agt. Kerr*, 8 *Bosw.*, 203).

Cuff owned the \$100. He bought a house and lot with it. He does not say that he took the \$100 without right or that he embezzled it. His language means that he borrowed it, *i. e.*, went to sheriff's office and got it, and took it and paid it to Pannes. He does not say that it was the sheriff's money, or whose money it was. Evidently he was a debtor for that \$100. When Cuff, therefore, left the sheriff's office with the \$100, and passed into the street, resolved to go and pay them to Pannes on the contract, he was the owner of the \$100. When he took the \$100 out of his pocket and, in his hands, tendered them to Pannes, with the intent to pay it to Pannes, the money was his own. Then he, as deputy sheriff, having the execution-debtor's money in his hands, neglected to levy and apply it on the execution in his hands (*Baker agt. Kenworthy*, 41 *N. Y.*, 215).

Cuff says this money was his wife's.

I submit that the use he made of it shows that he was a borrower of it from her, and thus he was the owner of it. He should have satisfied the execution out of it. I submit that a bank check is not a chose in action when signed and indorsed, and is leviable and salable under execution by sheriff.

The written instrument may be viewed in two aspects: One, as a contract which is intangible; the other, as a valuable piece of paper which is tangible. Had any one wrongfully taken it from Cuff, it could have been replevied by means of the sheriff (*Knehue agt. Williams*, 1 *Duer*, 598).

Such paper was personal property, and a vendor of it is liable on an implied warranty of title (*Ledwich agt. McKim*, 53 *N. Y.*, 312).

If the sheriff can recover and deliver possession of the paper or manuscript through replevin process, there is no

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doubt that the paper itself, as a valuable manuscript, could be put up for sale. It was tangible, and possession of it could have been delivered to a purchaser of it as a manuscript. Cuff had it in his hands. He was the sheriff's deputy; no levy on it or sale of it was made.

Cuff owned the furniture. It was subject to a chattel mortgage to Ann Conroy. She assigned this mortgage to James Mulry. His certificates show him to be the owner of the mortgage, and that it was in force during the running of the executions. There is no evidence of any foreclosure by Conroy. A foreclosure would have extinguished the mortgage, but the assignment of the mortgage proves that the mortgage was in force at the time of the assignment. No levy on this furniture was made. The sheriff should have sold it, subject to the mortgage (2 R. S., 290, § 2; *Stief* agt. *Hart*, 1 *Comstock*, 20; *Dennis* agt. *Whetham*, L. R. [9 Q. B.], 345; *See Albany Law Journal* for August 15, 1874, p. 106).

The general term of the marine court do not discuss this question as to the furniture at all.

No judgment for \$53.07 costs should have been rendered against the plaintiff.

I submit plaintiff was entitled to judgment for actual damages, \$235.37, because Cuff had the property subject to levy aforesaid. If not, then for nominal damages, by reason of the fraud and negligence of defendant in delivering the executions to Cuff. This would be for less than fifty dollars, and defendant would not be entitled to costs (*Laws* 1872).

The sheriff committed a tort in delivering the executions to Cuff. He had undertaken to perform the mandate of the court in plaintiff's interest and omitted to do it (*Addison on Torts* [abr. ed.], ch. 1, pp. 17 and 34).

Plaintiff is under no estoppel, as suggested by Mr. justice SHEA.

I submit that this irregularity was a gross fraud and omission of duty, and that the court, on appeal, will consider it,

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in view of its being a fact in the case contrary to the finding that the sheriff was not negligent, which is, therefore, a finding against the evidence.

I submit that Cuff's *positive word* should not have been considered in determining the fact where his word is contradicted by his acts. He was "a highly interested witness." He says he did not own the money; but his acts with the money show that he did own it. He says the mortgage was foreclosed; but he was not present at any foreclosure, and Mulry's certificates contradict him. He says he never exercised control over the pianos after he gave them to his daughters; but the mortgage shows that he made a conditional sale of them to Mulry.

The other grounds of appeal are well taken.

The judgment and orders should be reversed, and a new trial granted, with costs.

Brown, Hall & Vanderpoel, for respondent.

Appeal from a judgment of the marine general term affirming the judgment entered in respondent's favor in the court below.

Action tried March 19, 1874, before Hon. DAVID McADAM, justice, without a jury.

Judgment for defendant.

Action against defendant, as sheriff, for false return of three executions founded upon two judgments, one for \$110.66, and the other for \$110.69, in favor of the plaintiff in this action, and against Patrick Cuff. Judgments entered November 2, 1871, and November 27, 1871, respectively, and transcripts filed.

The answer puts in issue all the material allegations of the complaint, except that defendant was sheriff.

First execution issued November, 2, 1871, and returned *nulla*, May 4, 1872.

Second execution issued March 9, 1872, and returned *nulla*, May 21, 1872.

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Third execution, *alias* of second, issued August 6, 1872, and returned *nulla*, September 30, 1872.

The evidence shows contract for the sale and purchase of a house and lot No. 220 West Twenty-fifth street, between John B. Pannes and Patrick Cuff, dated December 19, 1871, and recorded April 9, 1872.

On the agreement was an assignment from Cuff to Patrick Fay, consideration one dollar.

The deed of this lot from Pannes was executed to Fay, not Cuff.

The consideration of \$500 was paid in two installments, one of \$100, December 28, 1871, and one of \$400, February 2, 1872, the latter in a check of Thomas Ryan.

The \$100 was not Cuff's money, but was money he had taken from the sheriff's office; Ryan's check did not represent Cuff's money but his wife's.

Pannes, the grantor, did not know for whom the contract was made; Cuff swears it was made at Fay's instance, and the deed shows it was for him.

The furniture was bought years ago; the pianos cost, one \$600, and the other \$350, ten or twelve years before, and were presented to his daughters when he was perfectly solvent; the furniture cost \$1,000 at different times.

There was no evidence as to its value at the time of the trial.

A chattel mortgage, to secure \$1,500 had been given by Cuff on the furniture and pianos, July 6, 1871.

It was payable on demand.

A demand had been repeatedly made for the money secured by the mortgage before November 1, 1871.

And the mortgagee had taken possession of the property and foreclosed the mortgage before the executions in question had been received.

No other things in action or property were shown — none were pointed out by the plaintiff.

The judge who tried the case delivered a written opinion,

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in which he says: "On the merits, the inferences and presumptions arising from the evidence produced by the plaintiff, tending to show that the judgment debtor named in the execution had property out of which the sheriff might and ought to have collected the judgments, is overcome by the positive evidence of the judgment debtor, that he had no property liable to levy or sale under execution at the time; and his equitable interest in the furniture, if of any value, was so situated that the sheriff was under no obligation to assume the risk and expense of a levy and sale, without at least a request if not an indemnity."

I. The answer to the question "Did Patrick Cuff, in December, 1871, pay you any money?" was properly excluded.

The mere fact of paying money to Pannes was not material.

The question to be tried was not whether Cuff had money, but whether he had money which the sheriff could levy on.

The sheriff can undoubtedly levy on money, but not in the pockets of the judgment debtor; much less can he levy on the money of another in the debtor's possession.

The question did not tend to show that Cuff had any money of his own in his possession, nor, if he had, that it was in a condition to be levied on by the sheriff. *Non constat*, he might have paid the money as an agent, or, in making the payment, might, as in fact he did, misappropriate or embezzle another's money.

This would give him no title to it (*Saltus* agt. *Everett*, 20 *Wend.*, 267; *McNeil* agt. *Tenth Nat. Bk.*, 46 *N. Y.*, 325).

It was also properly excluded on the ground that there was better evidence of the payment.

The evidence sought to be elicited by the question was subsequently fully admitted, when the plaintiff properly proved the fact.

II. The objection to the admission of the assignment, on the ground stated, is untenable.

The statute does not require a seal (2 *R. S.*, part II, chap.

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VII, title 188, p. 139, Edmonds' ed.; Tallman agt. Franklin, 14 N. Y., 584; 16 Ind., 219).

III. The exceptions to the questions are not well taken.

They certainly were competent; they were also material.

Because they effectually rebutted any inference that may have been drawn from the circumstances of the case, that the sheriff acted willfully and in disregard of his official duty.

They also tended to show that the plaintiff was as ignorant of any property belonging to the debtor as the defendant was.

IV. The question was not aimed at the contents of the written agreement, nor did it point at an explanation of it.

It was simply directed to the reason why it was taken *in Cuff's name*.

It was material to show whether the contract was made for himself or another.

V. The deed was properly admitted in evidence.

It was the highest proof of the fact that the real estate, the subject of the contract, never became the property of Cuff.

VI. The judgment is abundantly supported by the evidence. Any other would have been set aside by this court.

1. The plaintiff did not show any property in the judgment debtor, subject to levy on *execution* (*Ransom agt. Miner, 3 Sandf., 692; R. S., part III, chap. VI, § 13, et seq.*).

The \$100 was not his; it was "taken from the sheriff's office." This is not contradicted; as such it was not subject to levy (*Dubois agt. Dubois, 6 Cow., 494; Muscott agt. Woodworth, 14 How., 477*).

But even if it does not come within the rule of these cases, it was money collected by him in his capacity as deputy; as such it belonged to the person for whom it was collected, and was rightfully in his possession. It so continued until actually paid to Mr. Pannes, when it became Pannes', and was not subject to a levy. At any time before actual payment, Cuff's wrong intention might have been reconsidered, and he might have paid the money to the rightful owner. The misapplica-

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tion of the money and the payment to Pannes were simultaneous acts.

2. The check of Ryan for \$500 was not Cuff's; it belonged to his wife. This is not contradicted. But even if his, it was a thing in action.

Things in action are not subject to levy on execution (*Baker agt. Kenworthy*, 41 *N. Y.*, 215, affirming *Carroll agt. Cone*, 40 *Barb.*, 220; *Ransom agt. Miner*, 3 *Sandf.*, 692; *Ingalls agt. Lord*, 1 *Cow.*, 240).

3. The contract was not Cuff's, but was made for Fay; but if Cuff's, it, too, was a thing in action only, and not an estate, or interest in real estate, and therefore not the subject of levy on execution (*see authorities, supra, and 1 R. S.*, 736, § 4; *Judge agt. Cartwright*, 5 *Seld.*, 52; *Griffin agt. Spencer*, 6 *Hill*, 525; *Talbot agt. Chamberlain*, 3 *Paige*, 219).

4. There was no proof that the household furniture was worth more than \$1,500; it was old, and years before had cost only \$1,000, exclusive of the pianos, and with them the original cost of all was only \$1,950; and it would have been remarkable furniture that would have realized, after years of use, within \$450 of its cost. But from this must be deducted household furniture exempt from levy and sale under execution, to the extent of \$250.

Then there is no contradiction but that the pianos were given by Cuff to his daughters while he was solvent and not in contemplation of insolvency; such gifts are good, and such property could not be levied on.

But even if the furniture was worth all claimed by plaintiff, the *bona fides* of the mortgage on it was not questioned by him.

It is without contradiction that the mortgage was payable on demand; a demand had been made, and the mortgage was unpaid; even if there had been no foreclosure, the property was not subject to levy or execution after default (*Hall agt. Tuttle*, 8 *Wend.*, 375; *see opinion at page 392; Champlin*

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agt. *Johnson*, 39 *Barb.*, 606; *Howland* agt. *Willett*, 3 *Sandf.*, 607; *Stewart* agt. *Slater*, 6 *Duer*, 83).

5. No other property or thing in action was shown in Cuff.

6. There is an absolute failure on the part of the plaintiff of any cause of action against the defendant. As judge McADAM well says: "The influences and presumptions arising from the evidence produced by the plaintiff, tending to show that the judgment debtor named in the execution had property out of which the sheriff might and ought to have collected the judgments, is overcome by the positive evidence of the judgment debtor, that he had no property liable to levy or sale under execution at the time, and his equitable interest in the furniture, if of any value, was so situated that the sheriff was under no obligation to assume the risk and expense of a levy and sale."

VII. The judgment being supported by the evidence is conclusive as to any disputed questions of fact (*Roe* agt. *Conger*, 1 *Sweeny*, 382; *Rowe* agt. *Stevens*, 12 *Abb.* [*N. S.*], 389; *Smith* agt. *Tiffany*, 36 *Barb.*, 23).

The same rule applies, whether the cause is tried by a justice or jury (*Matthews* agt. *Poultney*, 33 *Barb.*, 127; *Arnoux* agt. *Homans*, 25 *How.*, 427).

VIII. The requests to find are all of them, in effect, merely requests to the justice to reverse his judgment on the facts presented, and his refusal so to do was not error, as we have already shown.

IX. It is admitted that the date of issuing the execution as stated in the fourth finding of fact is a mistake; it should have been "2d day of November, 1871," instead of "9th day of March, 1872." The other error, charged in the sixth finding, is a mistake of the plaintiff or his printer, as it is right in the original finding on file in this court.

But it is submitted that this is a mere clerical error, and does not affect any substantial right of the parties; if desirable to have it corrected, this court or the court below may so order; it is certainly not a reason for granting a new trial.

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X. The judgment of the court below should be affirmed, with costs.

CHAS. P. DALY, *Ch. J.* — This case presents the extraordinary feature that two executions against Patrick Cuff, a judgment debtor, were delivered by the sheriff to Cuff, who was one of the sheriff's deputies, to execute against himself, and by whom they were returned *nulla bona*. The action was for a false return.

The sheriff cannot execute process against himself, and where he is a party the process must be executed by the coroner (2 *R. S.*, 441, § 84).

Independent of the statute, this has always been the case (*Elston agt. Brett, Moore R.*, 547; *Weston agt. Coulson*, 1 *Wm. Bl.*, 506; *Vin. Abm., Sheriff, P.*; *Bacon Abm., Sheriff, M.*; *Com. Dig., Viscount E.*; *Watson on Sheriffs*, 51). He might originally, by the common law, serve the writ for the commencement of the action where he was the plaintiff; "but," says Viner, "if the sheriff be defendant, he cannot serve the process against himself;" but it was held at a later period that he could not serve the process even for the commencement of the action (*Bacon Abm., Process*; *pl.* 60, 8 *H.* 6, 28; *Vin. Abm., Sheriff, P.*, note). The reason of this rule of the common law, as given by Bacon, is "to prevent partiality, which every one is naturally guilty of to himself" (*Bacon Abm., Sheriff, M.*). And this reason applies as well to the deputy as it does to the sheriff.

It would be absurd to hold, when the sheriff is forbidden to execute process where he is a party, that he may authorize a deputy to execute process against himself; and yet this is what the sheriff did in this case. He delivered two executions against his deputy to the deputy to execute against himself.

In *Sherman agt. Boyce* (15 *Johns.*, 443), the deputy united with the defendant in making a note for the satisfaction of the judgment, on which money was raised and applied to the

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payment of the judgment, with the understanding between the deputy and the defendant that the deputy was to retain the execution in his hands, so that, if he were compelled to pay the joint note, he might enforce the execution by a levy and sale of the defendant's property; which arrangement was communicated by the deputy to the plaintiff in the judgment, when he paid over to him the money raised upon the note. It was held that although the deputy probably acted from benevolent motives, the whole proceeding on his part was illegal, and that he could not enforce the execution.

"To allow *any man*," said PLATT, J., "to wield the process of our courts *in his own favor*, to exact *such measure of justice as he may think due to himself*, would not only lead to oppression and abuse, but would tend to subvert the foundation of private right and civil liberty."

In *Mills agt. Young* (23 Wend., 314) a deputy sheriff who, by neglecting to levy, had made himself liable for the payment of the judgment, gave his note for the amount of it to the plaintiff, and took from the plaintiff an assignment of the judgment, by which he became the party interested in the enforcement of it. He then went to the judgment debtor, and, without telling him that he had become the assignee of the judgment, threatened to levy the execution, upon which the defendant gave him his note for the payment of the amount of the judgment, and also paid to him his fees upon the execution; and the deputy, in his character as deputy sheriff, made an indorsement that the execution was paid. It was held that the deputy could maintain no action against the defendant on the note. "Although," said BRONSON, J., it was formerly held that a *deputy sheriff* might serve a *capias ad respondendum* in his own favor where no bail is required, it is questionable whether he can do so now. But whatever may be the rule in respect to *mesne process*, it is clear that the sheriff cannot execute process in his own favor.

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I find no authority for such a practice, and to allow it would be opening a wide door to abuse and oppression."

If, as was held in this case, a deputy sheriff cannot execute final process in his own favor, neither should he be allowed to execute process which is against himself. Indeed, I think that the early case of *Elston agt. Brett* (*Moore*, 547) may be taken as authority for the proposition that no man can be allowed to execute final process where he has an interest.

Carpenter agt. Stillwell (1 *Kern.*, 69) is a further illustration of this salutary rule, in which judge W. F. ALLEN held that it makes no difference, in the application of it, whether the sheriff is nominally a party or only beneficially interested. He cites with approbation the passage quoted from PLATT, J., in *Sherman agt. Boyce* (*supra*), and dwells upon the danger of a perversion of the process of the court by an interested officer.

The present case itself is an illustration of the propriety of the rule that a public officer shall not have process put into his hands to execute against himself.

This deputy sheriff was, upon his own showing, insolvent. His furniture was mortgaged to his sister-in-law, who lived in the same house with him, and was thereby in possession of it. After one of these executions was placed in his hands, he made a contract for the purchase of a house and lot in this city, for which he was to pay \$2,725, \$500 of which was to be paid on the signing and delivery of the agreement, and to assume the payment of mortgages to the amount of \$11,500. One hundred dollars of the amount he paid on the 28th of January, 1871, which \$100 he says he "took from the sheriff's office," and the remaining \$400 he paid on the 2d of February, 1872, by a check, which he says was for money not belonging to him, but to his wife.

This contract, as appears by an indorsement upon it, which is without date, was assigned by him to one Patrick Fay, who he says was a friend of his, who advised him to secure the house, as it was for sale. The assignment is for the nominal

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consideration of one dollar. Whether Fay paid any more for it does not appear. It does, however, appear, on the defendant's showing, that a conveyance under this contract was made on the 12th of April, 1872, by the owner, to this Patrick Fay, upon the delivery of which conveyance some one must have paid the residue of the purchase-money payable by the contract, which was \$2,225. On the 9th of March, 1872, the other execution was placed in Cuff's hands, both of which executions were afterward returned by the sheriff *nulla bona*. That the \$100 which Cuff says he took from the sheriff's office belonged to Cuff appears in the fact that he disposed of it as his own property.

The sheriff's counsel argues that it was money collected by Cuff in his capacity as deputy, but that does not appear. He does not say so, nor that he embezzled it, nor that it belonged to the sheriff or to any other person. He simply says that he took it from the sheriff's office, which may have been strictly true. He may, from all he says to the contrary, have been entitled to take it, and such would be the presumption, as he paid it away in partial payment of a contract entered into for his own benefit.

The return of these executions, therefore, was a false return.

They were not and could not be executed by the delivery of them to Cuff to act as sheriff. No effort was made to ascertain if Cuff had any property upon which they could be levied; for in his hands there was no intention that they should be collected by a levy upon anything belonging to him. Whilst he had one of these executions in his hands he had property at least to the extent of \$100, which, from his acts, must be assumed to have belonged to him, and which could have been applied to the satisfaction of this execution. The return, therefore, was a false return, and the judgment rendered for the defendant was erroneous and should be reversed.

In an action against the sheriff for a false return, slight evidence is sufficient to put the sheriff upon proof of the

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truth of the return (*Crocker on Sheriffs*, § 861). In this case, the fact that the execution was put in the hands of the judgment debtor himself, and that after it was received the judgment debtor had \$100 which could have been applied in satisfaction of the judgment, was sufficient.

ROBINSON and LARRAMORE, JJ., concurred.

Judgment reversed and new trial ordered, with costs to abide the event.

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UNITED STATES CIRCUIT COURT.

OLGA DE MALUTA FRALOFF agt. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY.

Common carrier's responsibility — what constitutes baggage.

The limit of a public carrier's responsibility is as uncertain when left to be ascertained as a question of law by the court, as when left to the inquiry of a jury, because, in the nature of things, it is susceptible of no precise or definite rule what shall constitute the quantity or the value of the articles which may be deemed proper or useful for the purposes of the traveler.

But whenever the article in controversy is or may be wearing apparel, a question arises for the determination of the jury as to whether, upon the facts in the particular case, it was such as the traveler was entitled to carry as baggage, it follows that the finding of the jury, when sustained by credible testimony, must be conclusive.

Southern District of New York, April 1, 1875.

MOTION upon a case for a new trial. Action by passenger to recover for baggage lost while in charge of defendant. At circuit the jury rendered a verdict for plaintiff for \$10,000.

James W. Gerard, solicitor for plaintiff.

Elliott W. Shepard, for defendant.

WALLACE, J. — The facts upon which the verdict of the jury is predicated are so unusual, and the amount of the recovery, in view of the nature of the action, is so exceptional, that this motion deserves, and has received, careful consideration; but, notwithstanding the very elaborate and able argu-

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ment of defendant's counsel, and my own inclination to dissent from the conclusions of the jury upon one of the vital questions of fact, I am convinced that the case presented is not within the rules which authorize a verdict to be set aside as contrary to evidence.

Credible testimony was given which authorized the jury to find the following facts: That the plaintiff was a Russian lady of high rank and large estates, who for some time prior to coming to the United States had been traveling in Europe, spending her time mainly in its principal capitals; that, partly for health and partly for pleasure, in September, 1869, she determined to visit the United States, and left England under the escort of one Webber as a traveling companion, and came to New York city.

That, while in England, her baggage comprised twelve trunks; of them she brought here four large and two small ones, containing wearing apparel, for her own use, of great variety and quantity, and of very expensive quality; that, included in her wearing apparel, was a large quantity of rare and valuable laces, which she had been accustomed to wear occasionally at home and during her travels in Europe, and which she valued at \$200,000.

That she contemplated extensive travels in this country, and brought with her about \$15,000 for her expenses, but had no fixed plans as to the duration or details of her travels.

That, after staying several weeks in New York city, she commenced her travels here, and started for Chicago, intending to visit several places on the way, designing not to return to New York, but to decide after arriving at Chicago where she would go, contemplating in a general way going to New Orleans, Havana, California, and possibly Rio Janeiro, or to some of these places.

That she carried with her from New York one large trunk, a small trunk, a hat-box, four satchels, a bag containing jewelry, and a cage of birds; took with her the laces in question, which were packed in the large trunk; this contained several

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trays, the laces being in the fifth one from the top. Webber accompanied her. That they stopped at the Delavan House, Albany, for a day or two, and the large trunk was allowed to remain during that time in the baggage of the hotel, locked with other baggage; that Webber went to the trunk once or twice by plaintiff's request and procured from it articles which she wanted; that just before it was taken from the hotel to the defendant's depot, by the hotel porter, Webber returned these articles to the trunk; that he then saw the package in which the laces had been folded by plaintiff when she packed her trunks; that she locked the trunk, and soon after it was delivered by the porter to the defendant's baggage agent, checked for Niagara Falls, whither plaintiff and Webber went by the same train as did the baggage; that the trunk was in good condition when delivered to defendant's agent; that when it arrived at Niagara the locks were broken, the contents disturbed, and plaintiff refused to receive it until it was examined to ascertain if its contents were safe; that upon examination it appeared that the laces were missing, although nothing else had been taken; that articles of great value were necessarily exposed to view before the laces could have been abstracted from the trunk.

As to the value of the laces the jury were authorized to find a verdict for a very small sum or for \$62,000; some of the laces were collars and handkerchiefs and others were flounces, corsages and dress trimming of various kinds.

Although a large amount of testimony was elicited on the part of the defendant tending to contradict many of these facts, and upon some of them strongly discrediting the plaintiff's case, I am constrained to hold that there was sufficient evidence to authorize the jury to find them substantially as above stated.

Among other things, the jury were instructed that they were to decide, as a question of fact, under the rules defined by the court, whether or not the laces in question were baggage; and in this connection the court charged as follows:

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"The responsibility of a carrier cannot be maintained to the extent of making him responsible for such unusual articles as the exceptional habits, fancies or the idiosyncrasies of some particular individual may prompt that individual to carry. That liability is limited to responsibility for such articles as it is customary or reasonable for travelers of the same class or tastes in general to take with them for such journeys as the one which is the subject of inquiry." They were also instructed that they could find a portion of the laces to have been reasonable baggage and the remainder not.

I have summarized these facts and referred to the instructions mentioned, for the purpose of presenting satisfactorily the salient features of the case in regard to the question which has impressed me as the most serious one, viz., whether the jury could properly find that the property for which plaintiff has obtained a verdict was reasonable and ordinary baggage.

The jury must have found that laces of the value of \$10,000, carried by a traveler with a large assortment of other articles of apparel for personal use, are reasonable and ordinary baggage, for the loss of which a carrier to whom they have been delivered without notice of their value is responsible. On first impression the statement of this conclusion raises a somewhat violent presumption against the correctness of the verdict. No precedent for a recovery so large has been found, and if it is sustained it is difficult to ascertain where the limit of a carrier's liability exists.

Nevertheless, if the question was properly left to the jury to decide as one of fact, the value of the articles was peculiarly for their consideration, and abundant testimony was before them to sustain the conclusion they reached. The difficulty in this case lies in the character of the articles for the loss of which the action was brought. They were claimed to be a portion of her wearing apparel. If they were such, within all the cases they were baggage, unless they were so valuable and rare as to exclude them from that category. What is wearing apparel, must necessarily be a question of fact.

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What is reasonable and customary wearing apparel to be carried by a traveler upon a particular journey, must also be a question of fact. I know of no case where this has been held to be a question of law. The conflict in the authorities arises when we pass beyond these articles to inquire what other property is baggage. By some of these authorities it is held that the broad question is one for the jury to determine, both as to the character and value, depending upon the tastes and habits of the traveler, his pecuniary circumstances, position in society, and the conveniences and necessities of the particular journey, and that their decision cannot be disturbed (*Rawson agt. Penn. R. R. Co.*, 2 *Abb. [N.S.]*, 220; 3 *Barr*, 451), while by others it is held to be one of law for the court, and in these we find an irreconcilable conflict in its determination. Thus money for traveling expenses has been excluded (*Grant agt. Newton, E. D. Smith*, 95); and allowed (30 *N. Y.*, 594); jewelry excluded (2 *Bos.*, 589; 5 *Blatch.*, 538); and allowed (6 *Ohio*, 358; 4 *E. D. Smith*, 181); pistols excluded (56 *Ill.*, 22); and guns allowed (4 *E. D. Smith*, 453); manuscripts excluded (12 *Wall.*, 262); and allowed (6 *Blatch.*, 64.)

An examination of these cases justifies the remark that the limit of the carrier's responsibility seems as uncertain when left to be ascertained as a question of law by the court as when left to the inquiry of a jury. Holding as I do, that whenever the article in controversy is or may be wearing apparel, a question arises for the determination of the jury as to whether, upon the facts in the particular case, it was such as the traveler was entitled to carry as baggage, it follows that the finding of the jury when sustained by credible testimony must be conclusive.

If the court can set aside the verdict because it appears that the property was of greater value than the judge deems it reasonable that a traveler should carry, the question is no longer one of fact for the jury, but one of law for the court. If it is to be decided as matter of law, what standard of value is to be adopted? Illustrated by the present case, when the

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jury have found that the value of plaintiff's property was \$10,000, or that such of it is under the circumstances she was entitled to carry was of that value, is it to be said it must be set aside, whereas, if it had been \$1,000 or \$3,000 the law would sanction the recovery? If so, it is the duty of the court, instead of instructing the jury that they are to determine what in the particular case is reasonable and customary baggage, to instruct them that the value or amount must not exceed some arbitrary limit defined by the court. To this proposition I cannot assent. If carried to its logical conclusion, it would abrogate the functions of the jury with reference to questions of this class.

On the other hand, if the views I have expressed are a correct exposition of the law, the carrier is exposed to the hazards of most onerous responsibilities. In this case the verdict might have been for \$62,000, and it could not have been said that the verdict was contrary to the evidence as to the value of the property lost. It would be difficult to conceive that any facts would justify such a recovery for loss of baggage. Undoubtedly the case would be rare where such a verdict would not indicate prejudice, partiality or misconception on the part of the jury; and in such case, under its general power over verdicts, the court could set it aside. But had it been for that sum here, I am not prepared to say that it could not be sustained, in view of the extraordinary features of the case; as said by the supreme court of Pennsylvania: "It is not obvious in what manner the court can restrict the quantity or value of the articles that may be deemed proper or useful for the purposes of the traveler; because in the nature of things it is susceptible of no precise or definite rule; and when there is an attempt to abuse the privilege the court must rely upon the intelligence and integrity of the jury to apply a corrective." If carriers are unwilling to assume the liabilities which they may incur if this rule is adopted by the courts, they must resort to such regulations in regard to the

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transportation of baggage as are sanctioned by law, or appeal to legislation for protection.

I have not deemed it necessary to refer to any other of the many grounds upon which it is urged a new trial should be granted. I entertain no doubt that upon the other questions of fact there was sufficient evidence to justify the conclusions of the jury.

As to the rulings of the court upon the trial those of importance were quite maturely considered, and upon examination meet my approval now. The novelty and importance of the question involved render the case one eminently fit for the consideration of a higher tribunal, and to its consideration these questions should be remitted.

The motion for a new trial is accordingly denied.

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NEW YORK COMMON PLEAS.

EVERITT MESSENGER and others agt. THE FOURTH NATIONAL BANK.

Affidavits of jurors will not be received to impeach their verdict — new trial — surprise.

Affidavits of jurors will not be received to impeach their verdict.

If a plaintiff be taken by surprise, he should take a nonsuit, because if he proceeds with his case and seeks to take his chances for a verdict, he forfeits his right to a new trial on this ground.

With us the permission of the court is asked for to withdraw a juror, and to let the case stand over for a future day.

After discovered testimony, if material, is good ground for a new trial, but it must have been discovered after the trial.

Special Term, March 19, 1875.

MOTION for a new trial.

J. G. Lamberson and D. T. Welden, for plaintiffs.

Lee & Alvord and B. T. Kissam, for defendants.

DALY, C. J. — The application for the new trial must be denied.

It is a general rule, which has been long and well settled, that the affidavits of jurors will not be received to impeach their verdict (*Vaise agt. Delavan*, 1 Term R., 11; *Owen agt. Washburton*, 1 Bos. & P. N. C., 326; *Smith agt. Cheetham*, 3 Cai., 57; *Willing agt. Swasey*, 3 Gil. & Johns., 473; *Dana agt. Tucker*, 4 Johns., 487; *People agt. Columbia Co. Com. Pleas*, 1 Wend., 297; *Robbins agt. Wendover*, 2 Tyler, 11).

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The affidavit of a juror to impeach his verdict, say the court, in *Willing agt. Swasey (supra)*, ought to be rejected, because its admission would open a door to tamper with jurymen after they had given their verdict; it ought to be rejected, because it might be the means in the hands of a dissatisfied juror, to destroy a verdict at any time, after he had assented to it; in fine, it ought to be rejected, because it would unsettle all the verdicts in the country.

This case is no exception to this well settled rule. If the juror was laboring under the infirmity of deafness, he would have been excused upon applying to the court when he was called to be impaneled; or if, after sitting in the case, he found that he was unable from his deafness to hear the testimony, he should have made known that fact, and the parties would no doubt have consented that he might withdraw, and that the case should go on before the rest. It would not be to the interest of either party that their rights should be disposed of by a juror who could not hear the testimony. It not unfrequently occurs that a juror states that he is unable from his deafness to hear the evidence, and that he withdraws with the consent of all parties. I never knew a case where it was refused. But to allow him, when without making any complaint he has sat through the whole cause, and given his assent to the verdict, to impeach it by an affidavit that he did not hear the testimony, or the charge of the judge, might lead to the very abuses pointed out in *Willing agt. Swasey (supra)*, and which it was the object of this rule to prevent.

The other ground upon which a new trial is asked for, is, that the plaintiffs were taken by surprise by the testimony given by Rutherford, which they regard as inconsistent with the account of the transaction that had been given by Dana on the former trial. That he was taken by surprise not only by the unexpected testimony of Rutherford, but by the fact that Dana had been in the court attending as a witness, but was absent when Rutherford gave his testimony, and could not afterward be found to be examined by the plaintiffs,

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having kept out of the way at the instance and request of Rutherford.

That Rutherford's account of what took place in his presence may very well have surprised the plaintiffs, as Rutherford was not called on the former trial; nor was the fact of his presence at the time testified to by Dana. It may also be conceded that if the jury had had before them what was sworn to by Dana on the former trial, or if the plaintiffs had been enabled to examine him upon this trial, that it may have had a material effect upon the verdict; for the whole case turned upon the point whether Arthurs had authorized Fries to indorse Arthurs' name upon the check. I am also satisfied, from the evidence before me, that Dana was kept out of the way, through the instrumentality of Rutherford. But it does not follow from all this that the court will grant a new trial.

The rule originally was, that if the plaintiff was taken by surprise, his only remedy was to submit to a nonsuit (*Harrison agt. Harrison*, 9 *Price*, 89). I have no doubt, said baron WOOD, in the case cited, that the plaintiff was taken by surprise; but, he adds, he should have requested to be nonsuited, that he might have come better prepared in another action; but he chose, notwithstanding, to go on and take the chance of a verdict, by letting the case go to the jury, in the hope, perhaps, they would disbelieve the defendant's witnesses.

It would become a common course on all occasions of failure, if this were to be tolerated; for the plaintiff, instead of choosing to be nonsuited, as he ought to have done in this case, for that is the only proper course—to try first what the jury will do for him, and if he should fail he will then apply to the court for a new trial. It is impossible to listen to such an application.

A stronger reason exists in this country for refusing a new trial in cases of surprise, because the practice has been adopted with us, and has long been settled, that in cases of surprise the court may, upon the plaintiff's application, direct a juror to be withdrawn, and order the cause to stand over for trial

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upon some future day (*The People* agt. *The N. Y. Com. Pleas*, 8 Cow., 127; *United States* agt. *Coolidge*, 2 Gallison, 364; *The People* agt. *Ellis*, 15 Wend., 371; *The People* agt. *Olcott*, 2 Johns. Cases, 301).

It was held in *Willard* agt. *Weathebe* (1 *New Hamp. Cases*, 118), that when a party is surprised at the trial by evidence upon a particular point, it is a good cause for a motion to delay the trial; but where no such motion was made, it is no ground for granting a new trial; and in *The People* agt. *Mowks* (10 *How. Pr. R.*, 623), it was held that, in cases of surprise, the plaintiff must apply to the court for leave to withdraw a juror, or else submit to a nonsuit; but that he cannot, after submitting his cause, and finding the verdict against him, ask the court to relieve him on the ground of surprise. In *The People* agt. *The N. Y. Com. Pleas* (*supra*), the surprise was the absence of a witness, who had been duly subpoenaed, and who, it was expected, would be present at the trial. Judge IRWIN allowed a juror to be withdrawn, and the court, after a careful consideration of the question, decided that he had that power. This is one of the grounds of surprise in the present case — the absence of the witness Dana, who it was expected would be present.

That the plaintiffs had no intention of examining Dana appears in the fact that they did not subpoena him. They were surprised by the testimony of Rutherford, who swore to a state of facts which, if true, established conclusively that Arthurs directed Fries to indorse his (Arthurs') name upon the check. If it then became of material importance to the plaintiffs to examine Dana as to what occurred, and if he could not be procured, the plaintiffs should have asked the court for leave to withdraw a juror. This was their remedy, and their only remedy. They did not deem it of sufficient importance to make such an application, preferring, probably, as baron Wood said, to take their chance of a verdict, in the hope that the jury would believe Arthurs and disbelieve Rutherford and Fries.

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An early adjournment of the case was made after Rutherford's testimony, to enable the plaintiffs to procure Dana's testimony. They had until the opening of the court upon the next day to procure his attendance, but were unable to do so, and they neither applied to the court when they found that they could not obtain him, for leave to withdraw a juror, nor even offered to read the testimony which Dana had given upon the former trial to the jury, showing that they could not then have attached a great deal of importance to the inconsistency between the respective statements of Dana and Rutherford, as they did not even offer to read Dana's testimony, having probably great confidence in the result before the jury, in which, as it has turned out, they were disappointed. They cannot now be relieved by having a new trial.

The plaintiffs rely on the case of *Wehlkampff* agt. *Willett* (1 *Daly*, 4); but that was a case in which the defendants discovered, after the trial, that the plaintiff, who was a witness on her behalf, swore to a fact, and a very material one, that she had money in a savings bank with which she bought the property, and sufficient to have loaned her husband for the amount which he had borrowed, which was a material circumstance to strengthen her statement of her ability to purchase and pay for the property, and which was wholly false, it appearing by the testimony of an officer of the bank that she had no money at all in it at the time. It was discovered after the trial that this statement was false, and the plaintiffs had, in making it, been guilty of perjury. It is, therefore, very different from the present case, where the plaintiffs knew upon the trial the importance of Dana's evidence, if it were important and had the remedy which the law gives them, to ask that a juror be withdrawn; and *Wehlkampff* agt. *Willett*, moreover, was the case of a defendant who can neither submit to a nonsuit nor claim the right to have a juror withdrawn, whose only remedy was the one he sought, to have the verdict set aside—upon discovery after the trial that a most material statement made by the plaintiff, as a witness on her

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own behalf, was false and that he had committed perjury — a remedy which, in such a case, is always open to a defendant (*Margaret agt. Wilson*, 1 *Bos.*, 1 *Pul.*), for it is all that he has.

The motion for a new trial must, therefore, be denied.

Note.

N O T E .

We have left out of this Digest the list contained in the *N. Y. Reports* of "CASES REVERSED, OVERRULED, CRITICISED, QUESTIONED, DISTINGUISHED, DISAPPROVED, LIMITED OR EXPLAINED," as we think this practice, after a while, will produce confusion and impose upon the profession a vast amount of unnecessary labor. Take for instance an opinion reported eight or nine years ago, which a lawyer is desirous of using as authority, he is not safe in relying on it, unless he looks all through the subsequent volumes of reports, to see if it has not been *questioned, criticised, distinguished, disapproved, limited or explained*, according to the reporter's notions of some or one of these terms. It is well enough for the reporter to state the cases that have been REVERSED or OVERRULED (the latter are not frequent) and there let the subject rest. Let every opinion stand in the language of the judge as written by him and reported; and each member of the profession will judge for himself as to any *question or limitation, &c.*, which it contains without a public index of it, which is calculated to throw a haze or cloud over the opinion referred to, and thereby having a tendency to weaken the law.—[REP.]

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CONTAINING THE WHOLE OF

43 HOW., ANTE, AND QUESTIONS OF PRACTICE CONTAINED
IN 2 HUN, 54, 55 AND 56 N. Y. REPORTS.

ABATEMENT AND REVIVAL.

1. Where, in an action to foreclose a mortgage, a judgment of foreclosure and sale simply has been perfected, without a provision as to a deficiency, the death of the mortgagor does not prevent the execution of the judgment, and an application to revive is unnecessary. (*Hayragt. Thomas*, 56 N. Y. R., 521.)

ACTION.

1. Under the Code the legal rights of an owner of land may be established, and the equitable remedy, by injunction restraining interference therewith, obtained in the same action. (*Broistedt* agt. S. S. R. R. Co., 56 N. Y. R., 230.)

ADMISSIONS AND DECLARATIONS.

1. Declarations which are simply a narrative of a past transaction are not competent as a part of the *res gesta*. (*People* agt. *Davis*, 56 N. Y. R., 95.)
2. So, also, the mere relation by a co-conspirator of something already done for the accomplishment of the conspiracy, is not competent evidence against the others. (*Id.*)

3. Dying declarations are admissible in cases of homicide only when the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the declarations. (*Id.*)

4. Such declarations are not admissible upon the trial of an indictment under the act "for the better prevention of the procurement of abortions," &c. (*Chap.* 181, *Laws* of 1872). The charge is not a homicide in any degree, nor is the death of the mother a necessary ingredient of the crime; that of the child is sufficient to make the offense a felony, and the doing of the acts prohibited is a crime (§ 8), in the absence of the death of either, such death only increasing its degree and the punishment. (*Id.*)

AFFIRMATIVE OF ISSUE.

1. When the making, delivery and transfer of a note sued upon is admitted, but the indebtedness is denied, and the answer further alleges that the plaintiff is not the real party in interest, the affirmative of the issue is with the defendant. (*Morse* agt. *Gleason*, 2 Hun, 81.)

AMENDMENTS.

See ANSWER.

Toomey agt. *Andrews*, ante, 332.

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1. The record of the decision of a general term upon an appeal continues so far under the control of the court, irrespective of the members composing it, that it may amend such record to conform to the decision actually made, although the court granting the amendment is composed in part of different justices from those who heard and decided the appeal. An order granting such amendment is not reviewable here. (*Buckingham* agt. *Dickinson*, 54 *N. Y. R.*, 682.)
2. The issues to be tried in an action are not matters of form, but are of the substance of the litigation. The provision, therefore, of the mechanics' lien law for the city of New York (§ 5, *chap.* 500, *Laws of 1863*), making matters of form amendable at all times, does not require the court to amend, as a matter of course, the pleadings upon the trial of an action to foreclose a lien under said act, but it is within its discretion, and it is not an abuse thereof to refuse an amendment which introduces an entirely new cause of action or defense. (*McGraw* agt. *Godfrey*, 56 *N. Y. R.*, 610.)
3. The question whether the plaintiff can or cannot recover for goods sold without proving the fraud is a disputable and debatable one. (*Id.*)
4. An answer containing a general or specific denial of each material allegation of the complaint controverted, duly verified, cannot be stricken out as sham. (*Fellows* agt. *Muller*, *ante*, 53.)
5. Although the language of section 152 of the Code states that "sham and irrelevant answers and defenses may be stricken out," a general or specific denial of material allegations of the complaint may not be so disposed of. (*Id.*)
6. The admission by a defendant in his answer, of specific portions of a complaint, accompanied by a general denial of each and every other allegation, puts in issue such other allegations. (*Id.*)
7. As the order appealed from strikes out the entire answer, which contained a denial of material allegations of the complaint, it was unauthorized. (*Id.*)
8. An answer in an action for libel may contain matters both in justification and mitigation, and where they are applicable to either justification or mitigation, they are properly pleaded and cannot be stricken out as irrelevant or redundant. (*Jeffries* agt. *McKillop & Sprague Co.*, *ante*, 122.)
9. A defendant in an action for libel may allege the truth of the publication or that it was privileged. (*Kelly* agt. *Taintor*, *ante*, 270.)
10. Where the facts stated in a subdivision of the answer do not bring the alleged libelous matter within any of the classes of privileged communications, it cannot be sustained on demurrer as a privileged communication. (*Id.*)
11. The matter stated, however, if it fails to justify the libel, may be

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- given in evidence to mitigate the damages, if it has been pleaded separately for that purpose. (*Id.*)
12. Where the answer alleged that the article, on which the complaint is founded, is, as to the matters complained of, true, "according to the true intent and meaning thereof;" *held*, the defendant had the right to allege the truth as a defense, and that the mere surplusage of the last words, quoted, did not render it a defective pleading. (*Id.*)
13. Where an answer is served by mail, which does not admit of a reply, and is not in fact, replied or demurred to, the defendant's time to amend it, of course, is limited to twenty days next after the day of service. (*Toomey* agt. *Andrews*, *ante*, 332.)
14. Section 172 of the Code, analyzed and explained. (*Id.*)
15. Where the original answer was served by mail, and the plaintiff's attorney on the second day thereafter, noticed the cause for trial at the next circuit, and before the end of forty days, but after twenty days thereafter, the defendant served an amended answer, which the plaintiff's attorney immediately returned with notice that he declined to receive it, on the ground that it was not served in time, and also that the plaintiff accepting it would lose the circuit. (*Id.*)
16. *Held*, that the plaintiff's objections to receiving the amended answer were valid, and that the judgment taken by him at the circuit, by default of the defendant's appearance, was regular. (*Id.*)
- See FRIVOLOUS PLEADING.
Excelsior Savings Bank agt. *Campbell*, *ante*, 347.
- See REFERENCE.
Williams agt. *Allen*, *ante*, 357.
17. An answer was interposed in this action setting up the defense of usury, which was, upon motion, overruled, as frivolous, and judgment ordered for the plaintiff, which order was affirmed by the general term. Judgment having been entered in the action, this appeal was taken therefrom. *Held*, that the decision by which the answer was held to be frivolous, could not be drawn in question in this court on such appeal from the judgment. Whether that question can be considered in the court of appeals, on an appeal from a final judgment, is for that court to determine. (*Mahon* agt. *Hall*, 2 *Hun*, 154.)
18. After the service of an amended complaint and answer in an action, it is irregular for the plaintiff's counsel, in summing up the case, to read the admissions contained in the answer to the original complaint. But a judgment will not be set aside on the ground of such irregularity, when the facts so admitted are conclusively proved by other evidence. (*Payne* agt. *Kings Co. Manf. Co.*, 2 *Hun*, 673.)

APPEAL.

1. The recent decisions of the court of appeals in *Lieermore* agt. *Bainbridge* (47 *How.*, 854) and in *Gray* agt. *Flake* (53 *N. Y.*, 680), have settled, definitely, that even in cases where the motion is addressed to the discretion of the justice at the special term, an appeal lies to the general term; and in such case, if the justice decides wrongly in the first instance, it is not only the right but the duty of the general term to correct his error. (*Jeffries* agt. *McKillop & Sprague Co.*, *ante*, 122.)
2. Where the county court dismissed an appeal taken from a judgment of a justice's court, on the ground that the notice of appeal was not signed either by the appellant or his attorney, although the attorney for the appellant indorsed on the

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- back of it: "Notice of appeal, H. N. Warner, appellant's attorney, Hartwick, N. Y." *Held*, error. (*Burroughs* agt. *Norton*, *ante*, 183.)
8. It is not necessary that the notice of appeal should be signed by the appellant personally; it may be signed by others for him, and the indorsement of the appellant's attorney on the back of the notice was sufficient. Besides, the defect might have been cured by amendment. (*Id.*)
4. Where a receiver was appointed under the national bank currency act of the assets of an insolvent national bank — the defendant, and an action thereafter commenced against the defendant by service of summons upon the president, who for some reason or other refused to inform the receiver of the commencement of the action and a judgment was recovered by default. (*Security Bank N. Y.* agt. *Nat. Bank of Commonwealth*, *ante*, 185.)
5. Subsequently, at the instance of the receiver, an order was procured for the plaintiff to show cause why the judgment should not be set aside and the defendant have leave to answer the complaint — which motion was heard and denied, with leave to renew, and subsequently was finally denied: From this order an appeal was taken to the general term, which was strenuously resisted on the ground among others, that the order being one of a discretionary nature, was not appealable. (*Id.*)
6. *Held*, that it did not follow, because the order was discretionary, that it was not appealable; for the Code renders all orders appealable to the general term which either affect a substantial right; or are made in summary applications after judgment, and affect a substantial right. This right is not qualified by the fact that the order shall not be one of a discretionary character. (*Id.*)
7. On appeal from the general term of the marine court to this court, the undertaking required should be according to sections 854 and 856 of the Code. (*Holbrook* agt. *Brennan*, *ante*, 192.)
8. The service of notice of appeal from the special to the general term of this court, made after the expiration of the time limited for appealing, cannot be sustained, although the respondent's attorney admits due service of notice of the appeal. (*Waring* agt. *Senior*, *ante*, 226.)
9. If the admission of the respondent's attorney could be considered as a waiver of the irregularity as to him, it could not affect the notice served on the clerk. (*Id.*)
10. An order of judgment taken by default is not appealable. The remedy of the party is to apply to the court to have the default opened, or the order of judgment set aside. (*Flake* agt. *Van Wageningen*, 54 *N. Y. R.*, 25.)
11. The provision of section 348 of the Code, as amended in 1861, providing for an appeal to the general term from a judgment entered upon the direction of a single judge, "in all cases," has reference to cases tried and decided after hearing the parties, and where judgment has been rendered after an examination of the issues; it does not apply to a judgment to which the party, against whom it is rendered, has impliedly assented by his default. (*Id.*)
12. A referee appointed to take and report the evidence in a cause, has no power to pass upon objections to evidence, and where objections taken before him are not renewed, and rulings had thereon, upon the trial before the court, they are not available upon appeal. (*Fox* agt. *Moyer*, 54 *N. Y. R.*, 125.)

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18. Upon appeal from an order of general term granting a new trial, in an action tried by a jury, six years having elapsed since the granting the order, *held*, that it was too late for the appellant to ask to have the appeal dismissed, and that he be thus relieved from his stipulation. The order, therefore, affirmed, and judgment absolute directed against him. (*Post* agt. *Hathorn*, 54 *N. Y. R.*, 147.)
14. Upon appeal from an order granting a new trial it is not the right of the appellant to attack rulings made upon the trial in favor of the respondent. (*Simpkins* agt. *Low*, 54 *N. Y. R.*, 179.)
15. Where, upon an issue, a trial by jury is a matter of right, a final judgment ought not to be rendered by a court, on appeal, contrary to the findings of the jury, unless it affirmatively appear of inevitable necessity that the party cannot succeed upon a new trial. But, in proceedings of an equitable character, it is only necessary that the appellate court shall be satisfied that a final judgment will not work injustice. (*Muldoon* agt. *Pitt*, 54 *N. Y. R.*, 269.)
16. Where there are several appeals from a judgment at general term an appeal therefrom to this court, before all the appeals are heard and disposed of, is premature and irregular, but the remedy of a party seeking to avail himself of the irregularity is to move to vacate and set aside such judgment; he cannot wait until the cause is moved for argument upon the appeal to this court and raise the question here. (*Id.*)
17. Any illegal evidence received under objection, having a tendency to excite the passions, arouse the prejudices, awaken the sympathies, or warp or influence the judgment of jurors in any degree, cannot be considered harmless, and so the error be disregarded upon appeal. (*Anderson* agt. *R. W. & O. R. R. Co.*, 54 *N. Y. R.*, 394.)
18. Illegal evidence cannot be said to be entirely harmless where the party objecting to it is obliged to call a witness to explain or contradict it. (*Id.*)
19. Where a new trial is asked as a matter of favor, or rests in the discretion of the court, a condition may be imposed upon granting it; but where a party asks it as a matter of right, because some legal error was committed, this court has no discretion to grant or withhold it; but, finding error, is bound to reverse the judgment and grant a new trial, and cannot impose a condition thereon. (*Id.*)
20. The discretion of a court to reject evidence offered after the close of the testimony and before the submission of the case to the jury, is a judicial, not an arbitrary one; and, in case of abuse thereof, the wrong may be redressed upon appeal. (*REYNOLDS, C.*) (*Myer* agt. *Cullen*, 54 *N. Y. R.*, 392.)
21. An order denying a motion for a new trial, on the ground of surprise and newly discovered evidence, is not reviewable in this court. (*Dalrymple* agt. *Hannam*, 54 *N. Y. R.*, 654.)
22. On appeal from a judgment rendered by a justice of the peace, only those grounds will be considered, which are particularly taken and specified in the notice of appeal. (*Fowler* agt. *Milliman*, 2 *Hun*, 408.)
23. A judgment was recovered against one James L. Rightmire before the defendant as a justice of the peace, for \$11.40 damages, and \$5.55 costs. Plaintiff, in this action, on behalf of James L. Rightmire, served upon the defendant's wife a notice of appeal, and left with her seven dollars, supposed to be enough to pay the costs and the

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- justice's return fee to be applied to those purposes. As it was insufficient, the defendant, upon the expiration of the time to appeal, applied the money to the payment of the judgment. This action was brought to recover back the money so paid. *Held*, that the money, when paid to the justice, became the property of James L. Rightmire, and was no longer the property of the plaintiff, and that he could not maintain this action. (*Rightmire* agt. *Kimball*, 2 *Hun*, 598.)
24. A party seeking to enforce the rule that facts, though proven, are not available unless pleaded, must take this ground at the trial, otherwise he cannot avail himself thereof on review. (*Voorhees* agt. *Burchard*, 55 *N. Y. R.*, 98.)
25. Upon appeal from an order of general term, reversing, upon a question of fact, a judgment entered upon the report of a referee, the question here is not solely whether the court would have found the fact in the same way as did the referee; but, if it appears that his conclusion is not against the weight of evidence, that it might well have been either way, or that the testimony is slight upon which to found a conclusion contrary to his, then the consideration that the referee saw and heard the witnesses will lead to a deference to his opinion. (*Crane* agt. *Baudouine*, 55 *N. Y. R.*, 256.)
26. In an action for trespass upon lands against several defendants, one pleaded title, the others simply a general denial. It appeared upon the trial that all the other defendants acted under the one pleading title; evidence of his title was received on behalf of all the defendants without objection, and the case was tried upon the assumption that all the defendants stood before the court in the same position. *Held*, that it was too late on appeal to attempt to discriminate between them. (*Devyr* agt. *Schaefer*, 55 *N. Y. R.*, 446.)
27. Upon the trial of an indictment charging larceny, after former conviction for the same crime, no evidence was given of the discharge of the prisoner from imprisonment under the former conviction, either by pardon or expiration of sentence; the point was not raised upon the trial. *Held*, that it was not available upon appeal. (*Johnson* agt. *The People*, 55 *N. Y. R.*, 512.)
28. An order denying a motion to set aside an *ex parte* order striking out an answer is reviewable in this court (*Code*, § 11, *sub. 2*). (*Rice* agt. *Ehlers*, 55 *N. Y. R.*, 518.)
29. The authority to appeal from an order granting a new trial, given by section 11 of the Code (*sub. 2*), does not apply to an action by the people to oust defendant from an office and to establish the rights of a relator thereto; that section contemplates cases where final judgment can be given under the appellant's stipulation, which will dispose of the entire controversy. As the public are interested, the appellant cannot, by stipulation, give to another, who has no verdict in his favor, a right to the office; a final judgment, therefore, against the appellant would not establish the right of the other claimant, and, if given, would deprive the latter of the opportunity of establishing it. (*People ex rel.* agt. *Thacher*, 55 *N. Y. R.*, 525.)
30. The question of granting a new trial upon the ground that the applicant was misled by an intimation of the court as to the state of the issue presented, or as to the proper disposition to be made thereof, or whether in consequence thereof a rehearing upon such issue or any part of it, will be granted, is in the discretion of the

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- court below, and its determination cannot be reviewed by this court. (*Shuttleworth* agt. *Winler*, 55 *N. Y. R.*, 624.)
31. A complaint that the charge of the court upon a criminal trial was not as cool and dispassionate as it ought to be, if well founded, will not avail here. If no legal error was committed, the judgment cannot be reversed. (*Boyce* agt. *The People*, 55 *N. Y. R.*, 644.)
32. In an action brought by a married woman for a divorce, the court has the power to award the custody of a child to the plaintiff (3 *R. S.*, 148, § 59), and its discretion cannot be reviewed by this court upon appeal. (*Price* agt. *Price*, 55 *N. Y. R.*, 656.)
33. However rigid may be the rule requiring ample, clear and conclusive proof of mistake before the written contracts of parties will be changed upon oral testimony, this court cannot review the decision of the trial court upon such a question rendered upon conflicting testimony. (*Van Tuyl* agt. *W. P. Ins. Co.*, 55 *N. Y. R.*, 657.)
34. Where in an action in which no answer is interposed it is necessary to take and state an account for the information of the court before judgment, and a reference is ordered for that purpose, the report of the referee has the effect of a special verdict (*Code*, § 272); and where exceptions are filed to the report by defendant, which are overruled, the report confirmed and judgment rendered, an appeal from the judgment brings up the question whether the facts reported are sufficient to sustain the judgment, and upon a case with exceptions joined with the report, errors of law on the part of the referee may be reviewed. (*Darling* agt. *Brewster*, 55 *N. Y. R.*, 667.)
35. The right to a review in this court in civil cases is not a natural and inherent right, which cannot be taken away by legislation, but is created, and the jurisdiction of this court is designated and prescribed by the statute laws. (*People ex rel. agt. Fowler*, 55 *N. Y. R.*, 675.)
36. Where an act declares the decision of the general term of the supreme court in certain cases final unless an appeal is allowed by it, such allowance is within the discretion of the general term, with the exercise of which this court cannot interfere. (*Id.*)
37. This court will not interfere with an adjudication of the commission of appeals, upon the same points, between the same parties, in the same case. (*Terry* agt. *Watt*, 56 *N. Y. R.*, 91.)
38. The omission of this court, when sanctioning a former decision, to notice and discuss in the opinion supposed distinctions, is not sufficient to warrant a supposition that they have escaped observation. (*Id.*)
39. After a trial of an equity action by and a submission thereof to the court, it has power, while it remains in its hands under advisement, of its own motion, to direct certain issues therein to be passed upon by a jury, and an order to that effect is not reviewable by this court. (*Brinkley* agt. *Brinkley*, 56 *N. Y. R.*, 192.)
40. The supreme court has jurisdiction of all actions for partition, and while the proceedings are regulated by statute, it is for the court to determine whether the statute has been complied with, and to decide whether the case is a proper one to allow partition or sale; if it errs, the error can only be reviewed by exceptions properly taken. (*Howell* agt. *Mills*, 56 *N. Y. R.*, 226.)
41. An order denying a motion to set aside an execution is not review-

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- able in this court. (*Underwood* agt. *Green*, 56 *N. Y. R.*, 247.)
42. Where a party appealing bases his appeal upon exceptions to the legal conclusions of a referee from the facts found, the findings of fact must be assumed to be correct, and the respondent cannot raise the question that there is no evidence to sustain them. (*Second National Bank* agt. *Poucher*, 56 *N. Y. R.*, 348.)
43. In the conditions of a policy of insurance, it was provided that, if the insured property be held in trust, or be a leasehold or other interest not absolute, it must be so represented to the company. Plaintiff had a leasehold interest; this was not specified or referred to in the application. In an action upon the policy, no reference to this condition was made in the pleadings, on the trial, or in the report of the referee. *Held*, that the point could not be taken by defendant upon appeal to this court. (*Bedfield* agt. *H. P. Ins. Co.*, 56 *N. Y. R.*, 354.)
44. This court, upon a second appeal, where the same facts are presented, will not review the grounds of the former decision to pass upon a question which was then involved in the case, although not suggested by counsel upon the prior argument. (*Joslin* agt. *Covee*, 56 *N. Y. R.*, 626.)
45. An order of general term affirming an order of the court at circuit granting a motion, made on the judge's minutes, to set aside a verdict as against evidence, is not appealable to this court. (*Fallon* agt. *B. C., &c., R. R. Co.*, 56 *N. Y. R.*, 652.)
46. An application to the special term of the supreme court to open a judgment and allow a defendant to come in and defend is addressed to the discretion of the court. The power to review that discretion belongs to the general term. This court has no power to review the decision of the latter. (*Dewey* agt. *Dewey*, 56 *N. Y. R.*, 657.)
47. An order appointing a referee and requiring one who has refused to make an affidavit, claimed to be necessary for the purposes of a motion, to appear before such referee and make affidavit (*Code*, § 401), does not affect a substantial right of the witness, and is not reviewable in this court. (*Rogers* agt. *Durant*, 56 *N. Y. R.*, 686.)

ARREST.

1. Statutes authorizing arrest and imprisonment for debt, although remedial to the extent that they are designed to coerce payment, are also regarded as penal, and are not to be extended by construction so as to embrace cases not clearly within them. (*Hathaway* agt. *Johnson*, 55 *N. Y. R.*, 98.)
2. The provision of the Code (*sub.* 4, § 179) authorizing an arrest "when the defendant has been guilty of a fraud in contracting the debt or incurring the obligation upon which the action is brought," applies only to actual, personal fraud on the part of defendant, and does not include merely legal or constructive fraud. (*GROVER, J., dissenting.*) (*Id.*)
3. In an action, therefore, against a principal to enforce a contract for the purchase of property made by his agent, the defendant cannot be arrested on proof that the vendor was induced to enter into the contract and give a credit by means of fraudulent representations of the agent, when the fraud was not known to or authorized by defendant, and was not ratified by him after information thereof. (*GROVER, J., dissenting.*) (*Id.*)
4. An order of arrest and a writ of attachment are not so inconsistent

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in their nature that the allowance of both, in the same action, will render both void. (*R., R. I. & St. L. R. R. Co. agt. Boody*, 56 *N. Y. R.*, 456.)

5. Whether the party can, in the discretion of the court, be confined to one of these remedies, in a case falling alike under the description of cases wherein the two are respectively allowed, *quere*. (*Id.*)

ASSESSMENTS.

1. Where the proof is entirely insufficient to establish the fact that a certain newspaper, to publish legal notices, was designated by the comptroller of the city of New York for a certain year, and that the assessment proceedings in a street matter took place during that year, it is irregular to order the assessment vacated. (*Matter of Keteltas, ante*, 116.)
2. In order to obtain a vacation of an assessment for non-conformity with the law requiring publication of resolution or ordinance of the common council in certain newspapers, it must be shown that a certain paper in which the publication was not made was not only designated by competent authority, but that the paper so designated accepted such designation. (*Matter of Anderson, ante*, 379.)
3. An application to vacate an assessment, cannot be successfully made by a former lessee of the premises, who simply alleges that fact, and that he was, and still is, liable for the payment of the assessment. (*Matter of Burke*, 2 *Hun*, 281.)
4. Section 7, chapter 580, of the Laws of 1872, relative to assessments in the city of New York, cures all irregularities, therein mentioned, in local assessments. (*Id.*)

5. The acts of making and confirming local assessments are taken for the public benefit by public officers, and are to be presumed to have been rightfully performed. (*Phillips agt. The Mayor*, 2 *Hun*, 212.)

ASSIGNMENT.

1. In an action brought to set aside an assignment on the ground that it contained fraudulent preferences of debts which never existed, and that notes given to defendant were not collateral security for the repayment of amounts paid by him to the assignors, but were in fact purchased at such amounts, *held*, that the defendant was properly examined as to the disposition made by him after the assignment of the notes alleged to be collateral security for the sums due him. (*Dambmann agt. Butterfield*, 2 *Hun*, 284.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. The provisions of the act to secure to creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors (*chapter 348, Laws of 1860*), are only applicable to assignments by debtors residing in this state. (*Ockerman agt. Cross*, 54 *N. Y. R.*, 29.)
2. A voluntary assignment by a debtor residing in another state or country, valid by the laws of his domicile and not invalidated by any law of this state, operates as an assignment of the debtor's property situate in this state; and the assignees, after taking possession, can hold the same against attaching creditors of the debtor. (*Id.*)

ATTACHMENT.

1. An attachment in aid of an attachment brought to enforce cho-

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- ses in action, upon which an attachment has been levied, must be brought in the name of the sheriff or in the name of the debtor in the attachment. (*Lupton* agt. *Smith*, ante, 261.)
2. The provision of the Code (section 238), that actions may be prosecuted by the plaintiff in the attachment, do not authorize the plaintiff to bring them in his own name, but enables him to take the control of such suits when brought by the sheriff, or to bring the same in the sheriff's name on executing the bond of indemnity to the sheriff required by said section. (*Id.*)
 3. In an action to recover the sum of \$45,000, and interest, as damages for the breach of an alleged contract to deliver to plaintiff certain town bonds, an attachment may properly issue against a non-resident defendant. (*Clews* agt. *Rockford*, *R. I. & St. L. R. R. Co.*, 2 *Hun*, 379.)
 4. A warrant of attachment against a non-resident debtor may, if a cause of action is shown to exist, be issued at the time of issuing the summons, and may be levied upon the property of the debtor before a service of the summons. (*Webb* agt. *Bailey*, 54 *N. Y. R.*, 164.)
 5. This was so prior to the amendment of section 237 of the Code in 1866, and the provision then added as to the time when an action is to be deemed commenced for the purposes thereof, was but a legislative declaration of the law as it previously existed. (*Id.*)
 6. The authority of a county judge to issue an attachment given by section 238 of the Code, is not restricted in cases in the supreme court to be tried in his county. (*Id.*)
 7. In order to give a justice of the peace jurisdiction of an action commenced by attachment, the creditor is not required to furnish conclusive evidence of the facts relied on. It is sufficient if the proof has a legal tendency to make out in all its parts, a case for the issuing of the attachment; and if the facts and circumstances disclosed fairly call upon the magistrate for the exercise of his judgment, the proceedings are not void. To defeat his jurisdiction it must be made to appear that there is a total want of evidence upon some particular point. The rule is the same, whether the question arises in a direct or in a collateral proceeding. (*JOHNSON, C., dissenting.*) (*Schoonmaker* agt. *Spencer*, 54 *N. Y. R.*, 366.)
 8. An attachment was issued by a justice upon the ground that defendant had departed from the county and state with intent to defraud his creditors. It was founded upon affidavits which, after stating the indebtedness and the grounds of the application, stated, in substance, that defendant bought the goods, the subject of the indebtedness, upon a credit of thirty days, upon a false representation that he was in the habit of purchasing for cash, and that his stock was paid for; that soon after and before the credit expired he departed, and has not since returned; that his stock was running down and disappearing, and that, so far as plaintiff could learn from other creditors, it was all purchased on credit, and not paid for; that defendant's agent refused to do anything toward paying or securing plaintiff's debt; and that, as plaintiff believed, defendant had departed with intent to defraud his creditors; *held* (*JOHNSON, C., dissenting*), that the proof was sufficient to give the justice jurisdiction. (*Id.*)
- ATTORNEY:**
1. Attorneys and counsellors at law are classed as judicial officers, and

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subject to removal or suspension by the courts in which they shall be appointed, "for deceit, malpractice or misdemeanor," on charges preferred and opportunity given for defense. But every office becomes vacant on the removal of the incumbent or his conviction of an infamous crime. (*Matter of Niles*, ante, 246, 253.)

2. Where an attorney and counsellor at law is convicted and sentenced to the state prison for an infamous crime, to wit: for extorting money from innocent persons by threatening, as attorney, to bring actions against them for alleged acts affecting their morals, &c., he ceases to be an attorney and counsellor under the operation of the statute, upon such conviction and his going to state prison. The statute declares that any one guilty of an infamous crime shall forfeit his office if he is sent to state prison. (*Id.*)
3. By the provisions of the Revised Statutes (2 R. S., 620, sec. 7), an attorney prosecuting an action for a non-resident plaintiff is liable for costs to an amount not exceeding \$100; and such liability can be enforced summarily, by order. (*Willmont* agt. *Meerole*, ante, 480.)
4. The attorney, however, may relieve himself of this liability, by giving the security required by the statute. (*Id.*)
5. Where an attorney, not of record in the action, but only an attorney at law, signs a bond as security for costs for a non-resident plaintiff, it cannot be enforced against him by the court in a summary manner. The obligation can be enforced in no other manner than if it was the obligation of a person not an attorney or officer of the court. (*Id.*)
6. An attorney will not be allowed by the court to take any undue advantage of his client, but he may deal with his client openly and fairly, and in such case their agreements will be sustained by the court. Where a person acts rather in the capacity of a broker than that of an attorney, he is entitled to recover for his services, so rendered, as upon a *quantum meruit*, although the agreement in relation to his compensation is not sustained. (*Helms* agt. *Goodwill*, 2 *Hun*, 410.)
7. Evidence on the part of a defendant that plaintiff has agreed to give a portion of the recovery to his attorney, is incompetent. Such an agreement is lawful and does not discredit, as a witness, the party making it, nor does it give the attorney such an interest in the cause of action as to make his admissions proper, or to make him liable for costs. (*Sussdorf* agt. *Schmidt*, 55 *N. Y. R.*, 819.)
8. Where an attorney, without fraud, collects money as attorney and pays it over to his client, although the one paying it shows he is entitled to have it refunded, an order will not be granted requiring the attorney personally to refund it; but in such case the fact of payment over should be clearly shown. (*In re Wilmerdings* agt. *Fowler*, 55 *N. Y. R.*, 641.)
9. Where an action is brought against a married woman as sole defendant, who has a separate estate which may be impaired by the result of the action, and she employs an attorney to defend such action, it is presumed to be the intent of the parties that the attorney shall be paid for his services from the separate estate, and an action to recover the value thereof, and to charge the same upon such separate estate, maintainable. (*Allen and Folger, JJ., dissenting.*) (*Blanks* agt. *Bryant*, 55 *N. Y. R.*, 649.)
10. An attorney issuing an execution upon a judgment is liable to the

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- sheriff for his fees thereon. (*Campbell* agt. *Cothran*, 56 *N. Y. R.* 279.)
11. In an action *ex delicto*, against an attorney who has received a stipulated fee, for a breach of his professional duty, the measure of damages is not the amount of the fee, but the burden is upon the plaintiff of proving the damages he has sustained, not upon the defendant to prove how much of his fee he has actually earned. (*Quinn* agt. *Van Pell*, 56 *N. Y. R.*, 417.)
 12. The minutes of a former trial kept by an attorney, since deceased, are not competent evidence, although accompanied by proof that such attorney kept minutes during the whole trial, and that the minutes offered, according to the recollection of a witness present, appear to be of the entire trial. (*Crouch* agt. *Parker*, 56 *N. Y. R.*, 597.)
 13. Counsel may act as such at the same time for both parties to a transaction, and the fact that a contract is drawn by and under the advice of one, who at the time is counsel for one of the parties, when such fact is known to the other party, does not, in the absence of evidence of fraud or unfairness, invalidate or affect the contract. (*Joslin* agt. *Cowee*, 56 *N. Y. R.*, 626.)
 14. Communications between attorney and client, in reference to all matters which are the proper subject of professional employment, are privileged. (*Fates* agt. *Omsted*, 56 *N. Y. R.*, 632.)
- B.
BAIL.
1. The return by a sheriff to an execution against the person of "not found," subjects the bail of the defendant to an action upon his undertaking and is conclusive upon him. If the return be false, the bail has a right of action against the sheriff for the damage sustained by reason thereof. (*Coeine* agt. *Waller*, 55 *N. Y. R.*, 304.)
 2. In case of a recovery upon the undertaking and payment thereof, the bail is entitled to recover the amount so paid. Where the bail, instead of submitting to a recovery against him and looking to the sheriff for indemnity, has surrendered his principal according to law, within twenty days after the commencement of the action upon his undertaking, thus entitling him to an exoneretur, which will constitute a perfect defense to the action, his omission to avail himself of this defense places him in fault and, in such case, he is only entitled to recover the expenses of obtaining the exoneretur. (*Id.*)
 3. The form of surrender prescribed by section 188 of the Code, in case of a surrender before failure to comply with the undertaking, is not applicable to a surrender after commencement of an action upon such undertaking; in the latter case, the practice before the Code (2 *R. S.*, 380, §§ 21, 22) must be pursued. This requires an order for the commitment of the defendant to the custody of the sheriff; upon the certificate of the sheriff that defendant is in his custody, and upon notice to plaintiff, the court is authorized to make an order exonerating the bail, and until these proceedings are duly filed the liability of the bail continues. (*Id.*)
 4. The failure of the bail to complete proceedings for his exoneration will not wholly discharge the liability of the sheriff, incurred by a false return; but, if available to the latter for any purpose, it only goes to the reduction of damages. (*Id.*)

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5. A note given for interest upon arrears of interest is not usurious. (*Stewart* agt. *Petree*, 55 N. Y. R., 621.)

BAILMENT.

1. Bailments are divisible into three kinds: 1st. Those in which the trust is for the benefit of the bailor. 2d. Those in which the trust is for the benefit of the bailee; and 3d. Those in which the trust is for the benefit of both parties. (*First Nat. Bank of Lyons* agt. *Ocean Nat. Bank*, N. Y., ante, 148.)
2. Where the defendants — a bank, located in the city of New York — by their circulars, sent to many of the banks in the western states, solicited their accounts, and, amongst others, the account of the plaintiffs — a bank, located in the state of Iowa — and as an inducement, offered to pass checks on certain places to its credit, upon the day of their receipt, and to buy and sell government bonds, gold and stock for the plaintiffs, without charge. (*Id.*)
3. *Held*, 1st. That this come under the third subdivision of bailments above mentioned. (*Id.*)
4. *Held*, 2d. That this arrangement having been gone into, in pursuance of such circular, it was obviously as an inducement to the plaintiffs to place its accounts with the defendants, that the offer was made to gratuitously pass checks to its credit, and buy and sell for it here, government bonds, gold and stocks; and there was necessarily implied in this proffered service a safe keeping of such bonds, &c., as they should buy whilst they remained with the bank, subject to the plaintiffs' order. It was an undertaking to exercise ordinary care, or that degree of diligence which men of common prudence exercise in respect to their ordinary affairs. (*Id.*)
5. The defendants' bank was subsequently broken open and robbed, whereby the plaintiffs lost their property. It was claimed that the utmost engagement of the defendants was to use and appropriate for the safe keeping of plaintiffs' property such means, aids, appliances and agencies as they had when plaintiffs became their bailors, or as they might choose thereafter to require for their own benefit. That the plaintiffs accepted at their own risk what the defendants had to offer, and if it proved to be insecure, that the plaintiffs have no right to complain. (*Id.*)
6. *Held*, 3d. That this is distinguishable from the class of cases to which such a rule as this has been or ought to be applied. The plaintiffs had the right to suppose, from the circular, that the defendants used the ordinary means of institutions, undertaking so important a trust for the safe keeping of property of this description; and that when advised of any danger from burglary and robbery, that it would make use of such precautions for the safety of what was intrusted to its care, as would be dictated by common prudence and the exercise of ordinary vigilance. Indeed, the strong feature in the case is, that there was reasonable ground for apprehension that an attempt would be made to rob the bank. (*Id.*)
7. *Held*, 4th. That the question whether the defendants did exercise the care and diligence which was required of them from the nature of the bailments was a question which was not, under the circumstances, a question for the court but for the jury. (*Id.*)
8. *Held*, 5th. That after a careful review of the whole testimony, the case having been submitted to the jury, under a charge, it must be regarded upon the whole, as

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favorable to the defendants, and it being a matter which was solely for them, the verdict should not be disturbed. (*Id.*)

(Subsequently reversed and new trial granted by the court of appeals, on the ground that there was no contract of bailment by the defendants; and if it be conceded that the power of the corporation defendant could assume the position of bailee, there was no evidence of the delegation of the power to the executive officers of the bank.

(It would seem on looking at the facts of this case, as narrated in the opinion of DALY, Ch. J., *ante*, that there was abundant consideration for a contract of beneficial bailment to both parties, and having accepted and acted upon this consideration, the contract was fully consummated by both. And it would also seem that the defendants' corporation must be assumed to know of the acts of their executive officers in making this contract, as this incidental branch of the banking business was carried on extensively and publicly, which was sufficient, at least, to put them on inquiry, and in that case they would be estopped by ratification, from questioning the authority of their executive officers in entering into the bailment.—REP.)

BANK CHECK.

1. To entitle the holder of a check to be protected as a *bona fide* holder for value, it must appear that he has parted with something of value as the consideration for which the check was received; his contingent agreement to pay value for it, but never having actually done so, is not a sufficient consideration. (*Stevens agt. Corn Exchange Bank, ante, 351.*)
2. So where partial value only appears to have been parted with upon the faith and transfer of commercial paper, the right of the

holder to recover upon it has been restricted to the amount of such value. (*Id.*)

3. By certifying a check the bank obligates itself to hold so much of the drawer's credit or funds as may be required for the purpose of its payment, when it shall be presented. (*Id.*)
4. Where the drawer of a check, having sufficient funds in the bank to meet it, procures the check to be certified by the bank, and then lays the check aside among some of his other papers, where it remains six or seven years — having forgotten it, during which time he has drawn out all of his funds in the bank, he cannot compel the bank to pay the amount of the check again because it is merely outstanding. (*Id.*)
5. And a purchaser of such check, who is not a *bona fide* holder for value, stands in no better position to enforce its payment from the bank than the drawer. (*Id.*)

BILL OF LADING.

1. A shipper is bound by the terms of the bill of lading delivered to and accepted by him, at the time of the shipment of merchandise. Its terms become the contract of the parties. (*Bishop agt. Empire Trans. Co., ante, 119.*)
2. Where the shipper, after receipt of bills of lading, passes them to a third person and receives a loan of money upon them, it is a good reason for the conclusion that the shipper fully approved of their terms. (*Id.*)
3. And the party who makes the advances is also clearly bound by the terms of the bills. As much so as the purchaser of a bill of exchange is by the language of the draft he buys. (*Id.*)

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4. The seller of goods acts as the agent of the purchaser in the contract for their shipment by a common carrier. And the authority constituting this agency extends to the mode and manner or habit of dealing between the agent and the carrier in procuring a bill of lading from the carrier, although it is procured several days after the goods have been delivered to the carrier, and the carrier's receipt therefor given to the shipper, the agent, and the goods sent away, and although such bill of lading limits the common-law liability of the carrier by excepting a particular risk. (*Shelton agt. Merchants' Dispatch Trans. Co., ante, 257.*)

5. The rejection on the trial of any testimony tending to prove this method or habit of doing business between the shipper, the agent, and the carrier, is error, because it is essential to the disclosure of the actual contract between the parties. (*Id.*)

BILL OF PARTICULARS.

1. The court of original jurisdiction has the power to grant a bill of particulars in an action of *crim. con.* if it sees fit to order particulars to be furnished. (*Tilton agt. Beecher, ante, 175.*)

2. And where it decides that it has not such power, it commits an error in law which requires this court to reverse its decision. (*Id.*)

3. But whether in the exercise of its discretion it should grant or refuse the order for a bill of particulars, this court are not to decide. (*Id.*)

4. ALLEN, J., *dissenting*. — Holding that in all cases where this court had reversed the orders of the court below and remitted the proceedings by reason of a supposed want of power, it appeared by the order and record of the court, that

the decision of the court below was placed *exclusively* on the ground of a want of power. Here the motion was denied for want of power and for other reasons. The facts giving this court jurisdiction of the appeal must appear by the record; they do not so appear in this case. (*Id.*)

BOARD OF EDUCATION.

1. The board of education of the city of New York is not a department of the municipal government of that city, and the provisions of the charter (1873), in reference to the payment of moneys from the city treasury, do not apply to that board. (*People ex rel. Kedian agt. Neilson, ante, 454.*)

2. The several acts of the legislature relating to this subject contemplate that moneys required for the purposes of the board of education, or of the college of the city of New York, should be drawn out from the treasury of the city only by the draft of the president of said board of education, countersigned by the clerk of said board. (*Id.*)

3. Neither the auditor nor comptroller of the city have anything to do with claims against the board of education. (*Id.*)

BROKER.

1. Where, by a contract with the owner of real estate, the broker is bound to sell at a given price and within a limited time, if he does not sell for that price and within that time the contract is at an end, and the owner may then sell the property to a purchaser procured by the broker, at a less price and free from the broker's commissions. (*Satterthwaite agt. Vreeland, ante, 508.*)

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C.

CASE.

1. Where exceptions are taken to a referee's findings of fact, and a case is made for the purpose of reviewing them, it must be assumed that all the evidence in support of the findings excepted to is inserted in the case. If the party making up the case omits any such evidence, it is the duty of the other party, if he deem the evidence material to sustain the findings, to cause it to be inserted by amendment. (*Perkins agt. Hill*, 56 *N. Y. R.*, 87.)
2. "I know of no practice that will justify this court, at general term, in correcting the case as settled, on a motion." (*Porter agt. Parks*, 2 *Hun*, 675.)

CERTIORARI.

1. A common-law certiorari must be applied for and granted in open court, either at special or general term, and cannot be allowed by a judge at chambers. (*People agt. McDonald*, 2 *Hun*, 70.)
2. The right of the relators to a judicial determination as to the validity of the proceeding of the commissioners of appraisal, cannot be affected by an act of the legislature, confirming the acts of the commissioners, passed subsequent to the issuing of a writ of certiorari. (*Id.*)
3. The objection that the writ was improperly awarded, may be considered upon a return and hearing upon the merits. (*Id.*)
4. Allowing a motion to be made for an amended return without moving to quash a writ, is not a waiver of the right to make such motion. (*Id.*)

5. Pending an appeal to the county judge from the decision of commissioners of highways relative to a laying out of a highway, a writ of certiorari to review such proceedings should not be granted. (*People agt. Wallace*, 2 *Hun*, 152.)
6. The time of limitation to the issuing of writs of certiorari, which, in the absence of special circumstances, has been usually adopted by the court, is two years, in analogy to limitations upon writs of error. (*People agt. Walter*, 2 *Hun*, 385.)
7. The writ of certiorari issues only in the sound discretion of the court, upon special cause shown, and when issued will be superseded if the remedy sought be inconsistent with the interests of public justice and convenience. (*People agt. Assessors of Albany*, 2 *Hun*, 583.)
8. A statute prescribing that the determination of an inferior tribunal shall be final and conclusive, is a bar as well to a review by a common-law certiorari as by appeal. (*People ex rel. agt. Betts*, 55 *N. Y. R.*, 600.)
9. A writ of common-law certiorari can only be availed of, to review erroneous decisions or proceedings of inferior courts or tribunals, in cases where there is no other available remedy; and where otherwise injustice will be done; in all other cases, it will be confined to its original and appropriate office, *i. e.*, the bringing up the record of such inferior court or tribunal to enable the court of review to determine whether the former has proceeded within its jurisdiction. (*Id.*)

CHATTEL MORTGAGE.

1. Where a chattel mortgage has been filed in the proper clerk's office, and, within the time specified by

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the statute, the *original* mortgage, with an indorsement thereon exhibiting the interest claimed by the mortgagee in the property, is refiled in said office; *held*, that this is equivalent to filing a "true copy," as required by the statute, and a sufficient compliance with its requirements to continue the validity of the mortgage as against creditors of the mortgagor, and mortgagees and purchasers in good faith. (*Stockham* agt. *Allard*, 2 *Hun*, 87.)

CLAIM AND DELIVERY.

1. Where personal property is obtained from the owner through fraudulent representations, no demand from the vendee, before suit brought, is necessary. It is otherwise where the possession of the vendee is lawful. (*Salomon* agt. *Van Praag*, *ante*, 338.)
2. Where the defendant has purchased from the fraudulent vendee the property, with knowledge of the fraud, the same rule applies; no demand is necessary before suit brought. (*Id.*)
3. A jury is the proper tribunal to pass upon the facts and circumstances tending in any degree to establish fraud in the defendant, and it is incumbent on the defendant to satisfy the jury that he is a *bona fide* purchaser. (*Id.*)
4. The successful party in an action to recover the possession of personal property, in case recovery or return thereof cannot be had, is entitled to its value at the time of trial, and not at any intermediate time between the taking and the trial. If the value has been impaired during the detention, it should be included in the assessment of the damages caused by the detention. (*N. Y. G. and I. Co.* agt. *Flynn*, 55 *N. Y. R.*, 658.)

5. In the absence of any proof that the damages are more or less than the interest on the value, the presumption is that the damages are the interest during the time that the successful party was wrongfully deprived of the use. (*Id.*)

COMMISSIONERS OF PUBLIC PARKS.

1. When the law transfers to another body the performance of certain duties, it conveys all the powers possessed by the former body, not expressly repealed. (*Matter of Public Parks*, *ante*, 285.)
2. A discretionary power to discontinue a proceeding instituted to acquire title to certain lands having been possessed by the mayor, aldermen and commonalty of the city of New York, provided the same be exercised before the confirmation of the report of the commissioners of estimate and assessment, is possessed by their successors, the commissioners of public parks. (*Id.*)

COMMON CARRIER.

1. The seller of goods acts as the agent of the purchaser in the contract for their shipment by a common carrier. And the authority constituting this agency extends to the mode and manner or habit of dealing between the agent and the carrier in procuring a bill of lading from the carrier, although it is procured several days after the goods have been delivered to the carrier, and the carrier's receipt therefor given to the shipper, the agent, and the goods sent away, and although such bill of lading limits the common-law liability of the carrier by excepting a particular risk. (*Shelton* agt. *Merchants' Dispatch Trans. Co.*, *ante*, 257.)

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2. The rejection on the trial of any testimony tending to prove this method or habit of doing business between the shipper, the agent, and the carrier, is error, because it is essential to the disclosure of the actual contract between the parties. (*Id.*)

COMPLAINT.

1. Where the allegations of a complaint are sufficiently sustained by the testimony, if a cause of action *ex contractu* be otherwise set forth, it is not enough to authorize a nonsuit that the complaint contains an allegation suited to an action *ex delicto*. Where a motion for a nonsuit is not made upon the distinct ground that the action sounds in tort, and a contract is proved, a new trial will not be granted on that ground, as, if it had been pointed out, an amendment might have been allowed which would have cured the defect. (*Veeder* agt. *Cooley*, 2 *Hun*, 74.)
2. The complaint in this action set forth a grant of an easement of using all the water flowing from a pond which might be necessary to propel a grist mill; covenants in respect thereto by the grantor, and breaches of such covenants on the part of the defendant, who had acquired the title of the grantor; and asked for a judgment for \$1,000. At the trial plaintiff failed to prove that any covenants were made by his grantor, but was allowed to recover for a tortious interference by the defendant with his rights. *Held*, that the complaint set forth a cause of action *ex contractu*, and that a recovery for a tort could not be sustained. There was not a variance only, but an entire failure of proof. (*Beard* agt. *Yates*, 2 *Hun*, 466.)
3. Where a proposed amendment to a complaint, consists in the addition of new matter, relating to the subject-matter of the action already set out in the complaint, and is not a separate and independent cause of action, new and distinct in its nature and particulars, the fact that the statute of limitations may have run, pending the suit, and that defendant will not be at liberty to plead that statute in bar, is not sufficient to prevent the court from allowing the amendment. (*Risley* agt. *Phoenix Bank*, 2 *Hun*, 849.)
4. An order denying a motion to amend plaintiff's complaint, may be reviewed on appeal to the general term. Such a motion is properly denied on the ground of plaintiff's laches in making the motion. (*Gowdy* agt. *Poullain*, 2 *Hun*, 218.)
5. A complaint, alleging that a copartnership was entered into, in which plaintiffs and defendant were to share losses and profits; that it had expired, and that a loss had been sustained, and asking a money judgment, states a cause of action; and if the facts are true, the plaintiffs are entitled to recover. If the issue made by the answer in such case, required an accounting to be had, it would be ordered, notwithstanding a money judgment was asked for. (*Johnson* agt. *Kelly*, 2 *Hun*, 139.)
6. The complaint in this action alleged: That one Siphorus Hammond, in 1862, executed a deed of certain premises to his wife Lavina, upon an agreement between them, that delivery of the same should take effect, and the same be recorded, only upon his death. That in 1870 Lavina died, and Siphorus afterward married the plaintiff. That in 1872, Siphorus made his last will, whereby he devised his real estate to the plaintiff and certain of the defendants, and afterward died. That after the death of Lavina, the defendants, or some of them, surreptitiously procured the said deed; caused

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the date of certificate of acknowledgment of the same to be altered; and procured the same to be recorded, in order to make it appear of record that certain of them, as heirs at law of Lavina, were the owners in fee of the whole of the lands described therein. The plaintiff demanded judgment, that she be declared the owner in fee of an undivided fourth part of said premises, and entitled to dower in the whole thereof; that the said deed be declared void, and that it be canceled of record; that said premises be partitioned among the owners thereof; and that her dower interest be ascertained and admeasured to her. *Held*, on demurrer for improper joinder of causes of action, that the complaint did not contain three distinct and separate causes of action; that it presented a case in which the plaintiff might be entitled to three kinds of relief, upon the same state of facts: (*Hammond agt. Cockle*, 2 *Hun*, 495.)

7. A complaint, containing allegations showing a series of fraudulent acts, necessary either to the statement of the cause of action or in aggravation of damages, by which the plaintiff has been induced to marry the defendant, contains but one cause of action. (*Price agt. Price*, 2 *Hun*, 611.)
8. This action is brought to enforce a mechanic's lien, filed against the defendant, S. M. Parsons, who is alleged to be the owner of the premises, and the defendant, Edward K. Robins, who is alleged to have built houses thereon by permission of the said owner. The complaint then alleges that "Charles H. Parsons has, or claims to have, some interest in said premises as owner thereof; and that at the time of filing said notice of lien, he was under a contract with the defendant, Samuel M. Parsons, to convey said interest to the said Samuel M. Parsons,

or his legal representatives;" and asks that Charles H. Parsons be enjoined from conveying his interest in the premises until the further order of the court, and that the purchaser at the sale, under the judgment in this action, be entitled to a specific performance of the contract made by the said Charles H. with Samuel M. Parsons. Upon a demurrer interposed by the defendant, Charles H. Parsons, *held*, that the complaint did not, as to him, state facts sufficient to constitute a cause of action. That the complaint should have alleged not only a legal contract to convey, but facts entitling the grantee to a deed under it, such as performance or readiness to perform its conditions. (*Jenks agt. Parsons*, 2 *Hun*, 667.)

CONFESSION OF JUDGMENT.

1. A defective verification to a statement for a judgment by confession is amendable; and such an amendment may be properly allowed, where asked for in the answer, in an action against the judgment creditor to recover property, the title to which defendant claims by purchase upon a sale under an execution upon such a judgment. (*Cook agt. Whipple*, 55 *N. Y. R.*, 150.)
2. A judgment by confession, under the Code (§ 382), may be taken to secure future advances of notes and other commercial paper, agreed to be made by the plaintiff for the defendant, and which the former is to provide for at maturity. (*Id.*)

CONSTITUTIONAL LAW.

1. The provision of the tax levy act of 1860, authorizing the mayor and common council of the city of New York to make contracts for cleaning the streets of said city

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according to the terms and conditions prescribed by said act, is unconstitutional and void. (*Declin agt. Mayor, etc., of N. Y., ante, 457.*)

2. And such contracts cannot be enforced by the contractors or their assignees and successors. (*Id.*)
3. If such a contract was valid, the contractor would have no right to assign it to others without the express sanction of the common council. (*Id.*)

CONTEMPT.

1. Where on the settlement of the accounts of a receiver, an order of the court is issued directing the amount found to be due from him to be paid over on demand to the proper party, together with a specified sum in addition as referee's fees; and where a personal demand has been made of the receiver, under the order of the court, for payment of these sums, which has been refused, it is no objection to the validity of the order of the court on issuing the precept for commitment, or to the process, that it was issued for a less amount (by deducting the referee's fees) than was demanded. (*O'Mahoney agt. Belmont, ante, 29.*)
2. Where a witness duly summoned to testify before the grand jury, appears and refuses to answer a proper question propounded to him in the course of his examination, the court has power to commit him to the county jail until he shall answer such question, and such commitment is regular and lawful, both at common law and under the statutes of this state. Where a person so refusing to answer has been committed, and a *habeas corpus* has been granted, the officer allowing the writ has no power to inquire into the truth of the facts stated in the commitment, nor whether the question

was a proper one, or whether the prisoner was privileged from answering it. The justice or propriety of the commitment cannot be reviewed in this way. Where a witness has been committed by the court of oyer and terminer of Kings county, for refusing to answer a question put to him by the grand jury, and the court still remains in session, a justice of the supreme court in the city of New York, has no power to allow on his behalf a writ of *habeas corpus* made returnable before himself, and no power to discharge the arrest. (*People agt. Funcher, 2 Hun, 226.*)

3. Where an order was made, requiring the defendant to appear at a certain time and place specified, to show cause why he should not be attached for a contempt; on the return of which, an order was made adjudging him guilty of contempt, and directing his punishment therefor; and it did not appear that he was misled or failed to appear in consequence of the use of the term "*attached*," in place of "*punished*," held, that, as the use of that term did not appear to have prejudiced the defendant, and as the order to show cause had failed to specify the irregularity, as required by Rule 46, that the order should be affirmed. (*People agt. Kenny, 2 Hun, 346.*)

CONTRACT.

1. Marriage is established by and founded upon *civil contract*. It is not necessary to its validity that it should be solemnized in any particular form, or that the intervention of any priest or magistrate is at all needed to make the contract binding. (*Wright agt. Wright, ante, 1.*)
2. All that is necessary for its validity in this state is the deliberate consent of competent parties en-

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- tering into a present agreement to take each other as man and wife. (*Id.*)
3. This contract may be proved like any other fact, either by positive evidence of the agreement, or by evidence from which it may be inferred. (*Id.*)
4. A party may be held to a strict performance of a contract as to time, and be put in default for non-performance; but to do this, the party seeking to put the other in default must not only be ready and willing to perform, but he must tender performance at the time, and demand performance of the other party. (*Hubbell* agt. *Von Shoering*, 2 *Hun*, 376.)
5. When time is not of the essence of a contract, a party cannot be barred of his rights, without notice to perform in a specified reasonable time. (*Id.*)
- COSTS.**
1. Commissioners appointed to make partition of real estate are not entitled to more than two dollars per day for each day *actually* and *necessarily* employed in the business of such partition, besides their actual and necessary disbursements, even where they are also directed to sell a portion of the property. (*Campbell* agt. *Campbell*, *ante*, 255.)
2. Each commissioner is entitled to compensation at that rate only for the time he was actually and necessarily employed in the duties of his office. The affidavits used on a motion to adjust the fees and expenses of commissioners must show, in detail, the number of days' service actually and necessarily performed by each commissioner, and, also, the actual disbursements made by the commissioners, together with the necessity of incurring them. (*Id.*)
3. It is the duty of the clerk of the court, under section 811 of the Code, in the taxation of costs, to examine the charges for disbursements, and to disallow all which, in his judgment, are unreasonable or have been unnecessarily incurred. (*Delcomyn* agt. *Whamberg*, *ante*, 409.)
4. Where the plaintiff, a resident of London, applied at special term for a commission to take his testimony, on his own behalf, by commissioners appointed in London, without any provision in the order granted for the expense of the commission, and on the trial the plaintiff recovered a judgment, and the clerk, on taxation of the costs, as a part of the plaintiff's disbursements, allowed the commissioners' fees, amounting to nearly \$500, (*Id.*)
5. *Held*, on appeal from this taxation, that it would be improper to charge the defendant with an expense incurred by his adversary, for his own benefit and convenience, and which was incurred under no compulsion of law. (*Id.*)
6. It was competent for the plaintiff to have appeared at the trial and be examined on his own behalf. But if he had so attended he could not have been allowed fees as a witness. He would have had to go to his residence and return and be present at his own expense. (*Id.*)
7. Where judgment creditors procure an action to be brought in the name of a receiver appointed in supplementary proceedings instituted by them, they will be charged, on motion, with the costs of a successful defense of the action. (*Gallatin* agt. *Smith*, *ante*, 477.)
8. Where it appears that a receiver did not commence an action on his own responsibility, but that he allowed the judgment creditors to use his name and they employed

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the attorneys for the receiver, the action thus instituted by such attorneys, in the name of the receiver, will be deemed to have been "brought" by such creditors. (*Id.*)

9. The provision of section 806 of the Code, as amended in 1851, regulates, "in all actions," the whole subject of the allowance of costs to one or more of several defendants who obtain judgment in his or their favor, while the plaintiff recovers against the other defendants. (*Allis agt. Wheeler*, 56 *N. Y. R.*, 50.)
10. The right to costs in such cases is confined to those expressly mentioned in that section, i. e., where the successful defendant is not united in interest with those against whom plaintiff recovers, and where they make separate defenses by separate answers; and in those cases the allowance is in the discretion of the court. (*Id.*)
11. A proceeding under the general railroad act (*chap. 140, Laws of 1850*), for the condemnation of land for railroad purposes is a special proceeding, but is analogous in its purpose and scope to an action; and services in resisting the application are similar to services in defending an action. (*In re R. & S. R. R. Co. agt. Davis*, 55 *N. Y. R.*, 145.)
12. When, therefore, costs for contesting are allowed, under the "act in relation to special proceedings" (*chap. 270, Laws of 1854*), authorizing the allowance of costs in special proceedings, in the discretion of the court, and providing that, when allowed, they shall "be at the rate allowed for similar services in civil actions," the party is entitled to full costs upon hearing and upon appeal, as in an action, at the rates prescribed by the Code. (*Id.*)
13. The costs referred to, however, in said act, are simply those to which the party is of right entitled; no extra allowance can be made. The provision for extra allowance in section 309 of the Code applies to actions only, not to special proceedings. (*Id.*)
14. Upon taxation of costs, in an action tried by a referee, the clerk has nothing to do with the question whether the referee's report has been regularly obtained. His decision awarding judgment stands before the clerk as the mandate of the court, and until vacated or set aside, on proper application to the court, its direction must be obeyed. (*Ballou agt. Parsons*, 55 *N. Y. R.*, 673.)
15. The defendants herein, appearing by the same attorney, separately demurred to the complaint; at special term the plaintiff had judgment on the demurrer, as to one defendant, with costs; the other defendant had judgment against the plaintiff, upon the demurrer, with costs. The plaintiff appealed from the judgment against him to the general term, which affirmed the judgment with costs. The defendant, whose demurrer was overruled, also appealed to the general term, which reversed the decision of the special term, with costs. The special term refused to allow the defendants to tax separate bills of costs. *Held*, that this was error. The general term have settled, as to the present case, the rights of the parties to costs, and there is no power in the special term to modify the general term order, so long as it stands unreversed. (*Müller agt. Coates*, 2 *Hun*, 688.)

COUNTER-CLAIM.

1. In an action to recover rent, the lessee has a right to set up, as a counter-claim, damages arising from a breach of an agreement in

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the lease, on the part of the lessor, to keep the premises in repair. (*Cook agt. Soule*, 56 N. Y. R., 420.)

2. Where the lease is for a year, the fact that the lessee has paid the rent, except for the last quarter, does not deprive him of the right to counter-claim his damages for the entire year, and if in excess of the rent, he is entitled to a verdict for the excess. (*Id.*)

3. A surety, when sued upon his obligation, cannot avail himself of an independent cause of action existing in favor of his principal against the plaintiff as a defense or counter-claim. It is for the principal to determine what use he will make thereof; and the surety has no control over him in this respect. (*Lasher agt. Williamson*, 55 N. Y. R., 619.)

4. A counter-claim existing in favor of three persons jointly, cannot be set up in an action against one of them on his individual obligation. (*Hopkins agt. Lane*, 2 Hun, 38.)

COUNTY JUDGE.

1. The authority of a county judge to issue an attachment given by section 228 of the Code is not restricted in cases in the supreme court to be tried in his county. (*Webb agt. Bailey*, 54 N. Y. R., 164.)

COVENANT.

1. The statute is explicit that no covenant shall be implied in any conveyance of real estate. A lease is a conveyance within the meaning of statute. (*Doyle agt. Lord*, ante, 142.)

CRIMINAL LAW.

1. The amount and degree of violence which must be exerted by a prisoner, to bring him within the

statute defining robbery in the first degree is not declared, and manifestly could not be. The gravamen of the crime, as declared by the statute, consists in taking "the personal property of another from his person, or in his presence, and against his will, by violence to his person, or by putting such person in fear of some immediate injury to his person." (*Mahoney agt. People*, ante, 185.)

2. It is not the extent and degree of force which makes the crime, but the success thereof. In short, the force which is sufficient to take the property against the owner's will is all that the statute contemplates. (*Id.*)

3. The distinction between robbery and larceny consists in this: In the latter, the act "is accomplished secretly, or by surprise or fraud," while in the former, the felonious taking must be "accompanied by circumstances of violence, threats or terror to the person despoiled." (*Id.*)

4. Where the prisoner, on exceptions, objects to the charge of the court to the jury on the trial, that if they believed the truth of the evidence of the complainant hereinbefore detailed, then the prisoner was guilty of robbery in the first degree as charged (and not merely guilty of larceny from the person); and if the bill of exceptions is so drawn as not to show to this court all the evidence of violence upon which the court and jury acted, it cannot prevail. The error does not affirmatively appear. (*Id.*)

5. It is an elementary principle that in the absence of all the evidence given upon the trial, the appellate court will assume, when the question is upon the sufficiency of the evidence, that that which is not returned to it, warranted the ruling, and justified the verdict. (*Id.*)

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See CRUELTY TO ANIMALS.

People agt. Brunell, ante, 435.

CRUELTY TO ANIMALS.

1. At common law, cruelty to an animal merely upon the ground that it gave pain to the animal, and for the protection or for the sake of the animal, was not indictable. Although under certain circumstances acts of cruelty when publicly committed, to the annoyance of the public, or when committed with a malicious intent to injure the owner of the animal might have been indictable at common law. (*People agt. Brunell, ante*, 435.)
2. This modern legislation, for the purpose of preventing unjustifiable cruelty to animals is the result of modern civilization, cultivated by the christian religion, arts and science. (*Id.*)
3. Certainly, the purpose of these acts is praiseworthy. It is impossible for a high-minded man to say that unjustifiable cruelty is not a wrong—a moral wrong at all events, and why should not the law make it a legal wrong? (*Id.*)
4. Mr. Bergh's efforts, and the efforts of the officers of his society, in a discreet and judicious manner, to enforce these laws for the protection of animals and to prevent cruelty to them, deserve all praise. (*Id.*)
5. The indictment in this case contains three counts. The first substantially charges that the defendants caused the horse mentioned in the indictment to be "over-driven." The second count intends to charge that the horse mentioned in it was caused by the defendants, in legal effect, to be cruelly and unjustifiably "overloaded." The third count substantially charges that the defendants caused the horse mentioned

in it to be "tortured and tormented," by causing him to be hitched to a vehicle or omnibus, and driven and required to do the work which he was called upon to do under those circumstances, when he was in a certain condition as to strength, health and ability to do work, when he was suffering from certain ailments, defects and unsoundness specially stated in all the counts of the indictment. (*Id.*)

6. The court charged the jury that if they were satisfied from the evidence that the horse was ailing, and defendants, Brunell and John Marshall, knowing this fact, caused the horse to be harnessed, driven and worked, as alleged in the second count of the indictment, they willfully, unjustifiably and cruelly caused the horse to be overloaded. And further charged, that if the jury were also satisfied from the evidence, that the defendants, Brunell and John Marshall, considering the condition of the horse, cruelly, willfully, unnecessarily and unjustifiably caused the horse to be driven and worked as alleged in the third count of the indictment, the horse necessarily was caused to suffer torture or torment or great bodily pain, and the jury should convict the two defendants, Brunell and John Marshall, of the offenses charged in said second and third counts of the indictment. (*Id.*)
7. The court stated to the jury that the question, really, was not whether these defendants intended to torture the horse; the question really was whether they willfully caused certain things or acts to be done which did necessarily torture the horse. (*Id.*)

D.

DAMAGES.

1. Where the evidence of the plaintiff, on the trial, showed that he

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was a passenger on the car of defendant's horse railroad; that the plaintiff was hauled out of the car, on to the front platform, by the conductor; that the plaintiff held on to the handrail while the conductor pushed him; that the car started; that he was on the lower step of it, when the conductor pinched his hand, and he had to let go and get off. (*Hamilton* agt. *Third Ave. R. R. Co.*, ante, 50.)

2. *Held*, that on the present trial the court charged the jury in accordance with the rule of damages indicated by the court of appeals, which granted a new trial therein (58 *N. Y.*, 25) because the court had charged the jury that they might give exemplary damages (and the jury gave \$500 damages), and it was held that the plaintiff had a right to compensatory damages only, including not only compensation for the loss of time and the amount the plaintiff had to pay for his passage upon another car, but, in addition thereto, the injury done to his feelings might be taken into consideration by the jury, and a suitable recompense given therefor. (*Id.*)
3. The damages awarded on the last trial are three times what they were on the previous trial, and that, also, under instructions from the court that they must be purely compensatory, in accordance with the views expressed by the court of appeals upon granting a new trial in this action. The amount appears to be excessive, and the verdict should be set aside and a new trial granted, on payment of costs of the last trial and of opposing this motion. (*Id.*)

DAY.

1. The court, in ordering a verdict, estimated eight hours as eight-tenths of a day; *held*, that the terms of the bill of lading did not authorize such a restricted mean-

ing to the word "day;" the eight hours should have been estimated at eight twenty-fourths of a day. Verdict reduced. (*Wiles* agt. *N. Y. C. & H. R. R. Co.*, 2 *Hun*, 109.)

DEATH.

1. The record of the proofs and proceedings had in the surrogate's court on the proof of a will of an alleged deceased person, is sufficient evidence of his decease as to parties who were all before the surrogate when such proceedings were had. (*Carroll* agt. *Carroll*, 2 *Hun*, 609.)

DEED.

1. Where a man conveys his real estate to his four minor children by deed, with full covenants of warranty, "reserving to himself the entire and exclusive use, benefit and control of said premises during his natural life, and reserving also to himself the power to dispose of said premises or any part thereof, by a deed executed in the name of the parties of the second part, or in his own name alone, in trust, nevertheless, and for the benefit of the said parties of the second part, and to hold the purchase-money in trust for their use, or to loan it upon good securities during his life, thereby securing to them the principal sum at his death, retaining the interest for his own use and benefit," and subsequently a conveyance is made of a portion of the premises by him, in his own name, to a third person. (*Johnson* agt. *Reeves*, ante, 505.)

2. *Held*, that such conveyance is sufficient to convey a fee simple of the premises. If not good as an express trust vested in the grantor, it can be upheld as a power in trust under the statute. (*Id.*)

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3. By the Revised Statutes (2 R. S., 187), no conveyance or charge shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration. (*Childs* agt. *Connor*, *ante*, 513.)
4. If it appears from the evidence and circumstances that a conveyance of real estate made by the husband to his wife was a reasonable and proper provision for the wife, and that her property had been employed in the purchase of it by her husband, and that in equity she was his creditor, and that in the condition of her husband's estate at the time there was nothing more in the transaction than what was just and fair as a settlement for her, the conveyance cannot be invalidated by his subsequent inability to pay a debt then existing. (*Id.*)

DEFENSES.

1. The fact that one domiciled in one of the late Confederate States during the war of the rebellion took no active part therein, and held no office or employment under the Confederate government, did not change his legal condition during the war as an alien enemy; and such a person had, during that period, no *status* in the courts of this state, to enforce a contract against a citizen thereof. (*Burnside* agt. *Matthews*, 54 N. Y. R., 78.)
2. Such a defense, however, is merely technical and dilatory, and to be effectual should have been pleaded specially and with certainty. (*Id.*)
3. Where, in an action brought by a citizen of Louisiana against a citizen of this state during the war, no defense was interposed that at the time of the commencement of the action the plaintiff was an alien enemy, and where

the trial took place after the termination of hostilities, *held*, that presenting the question at the end of the trial could not remedy the defect in pleading, and that a refusal of the court to submit the same to the jury was not error. (*Id.*)

4. A surety, when sued upon his obligation, cannot avail himself of an independent cause of action existing in favor of his principal against the plaintiff as a defense or counter-claim. It is for the principal to determine what use he will make thereof; and the surety has no control over him in this respect. (*Lasher* agt. *Williamson*, 55 N. Y. R., 619.)
5. In an action brought by the receiver of a judgment debtor to have the transfer of a promissory note, alleged to have been made by such debtor in fraud of his creditors, adjudged to be void, and to enforce the note as the property of the debtor, the maker of the note defended, denying plaintiff's title and alleging payment. Plaintiff failed to show the fraud, or title to the note. *Held*, that the fact of payment to another claimant was immaterial and unnecessary to sustain the defense. (*Terry* agt. *Wait*, 56 N. Y. R., 91.)

DEMURRER.

1. On an appeal from an order sustaining or overruling a demurrer to an entire pleading, when leave to plead over or amend is not granted, the successful party is entitled to full costs under section 307, subdivision 5, of the Code—the order being substantially a judgment. When leave is given to amend or to withdraw a demurrer and plead over, the order is merely interlocutory, and ten dollars costs only are allowed. When the order is or becomes final, by reason of the fact that the time given to plead over has

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expired, so as to determine the rights of the parties, full costs of appeal will be given. (*Hoffman agt. Barry*, 2 *Hun*, 53.)

2. When a demurrer is interposed, in an action for relief, which is overruled and no answer is put in, the material facts stated in the complaint are, for the purposes of the action, to be taken as true (*Code*, § 168). One of these purposes is to furnish evidence on the hearing, and the plaintiff does not entirely lose the benefit of this evidence by introducing testimony, and not objecting to the defendants' doing so. In such case all the evidence must be taken and considered together by the court or referee. (*Darling agt. Brewster*, 55 *N. Y. R.*, 687.)
3. The granting of an extra allowance by the court below in such case is within its power and discretion, with the exercise of which this court cannot interfere. (*Id.*)

DEPOSITION.

1. Testimony otherwise competent taken upon commission is not to be rejected, because not responsive to the interrogatory. (*Fussin agt. Hubbard*, 55 *N. Y. R.*, 465.)
2. Where a witness testifies positively to facts which may be within his personal knowledge and the opposite party makes no inquiries to ascertain whether they were so or not, the court must assume that the witness speaks from such knowledge. This rule applies as well where the testimony of the witness is taken upon commission as to an oral examination. (*Id.*)

DETERMINATION OF CLAIMS TO REAL PROPERTY.

1. An action, under the provisions of the statutes (2 *R. S.*, p. 312, as

amended by chap. 50, *Laws of 1848*; chap. 116, *Laws of 1854*; chap. 511, *Laws of 1855*; chap. 173, *Laws of 1869*; and chap. 319, *Laws of 1864*; *Code*, § 449), for the determination of claims to real property, is not authorized against infant defendants. (*Bailey agt. Briggs*, 56 *N. Y. R.*, 407.)

2. The only change wrought by the *Code* (§ 449), in proceedings to determine claims to real property, is that now they may be prosecuted by action. Such action must be in pursuance of the provisions of the Revised Statutes. The complaint must allege that the defendants unjustly claim title to the premises. It must, also, in its prayer for judgment or otherwise, notify defendants that, unless they appear and assert their claim, they will be forever barred. (*Id.*)

DISCONTINUANCE.

1. Section 232 of the *Code* limits the right of the sheriff in discontinuing attachment suits brought by him, except "at such times and upon such terms as the court or judge may direct." (*O'Brien agt. Merchants Ins. Co.*, ante, 13.)
2. The court will not allow any discontinuance of such actions on the part of the sheriff that will inure to the injury of the parties interested in the debts attached. (*Id.*)

DISCOVERY.

1. A party cannot compel the production of books, papers and accounts, unless it appears that such production is indispensably necessary and not simply a precautionary measure. Such necessity does not exist when the party applying may have in his possession, or under his control, the means of acquiring all the in-

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formation he seeks to obtain. (*Campbell* agt. *Hoye*, 2 *Hun*, 308.)

2. After a party has appeared and pleaded in an action he is entitled to notice and has a right to be heard before the granting of an order striking out his pleading and precluding him from prosecuting or defending the action. (*Rice* agt. *Ehele*, 55 *N. Y. R.*, 518.)

3. He cannot be deprived of this right by an order affixing as a penalty for the violation of its mandate the striking out of his pleading. Before the order can be made absolute or an absolute order based thereon, it must be made to appear to the court, upon notice to the party, that he has failed to comply. (*Id.*)

4. The provisions of the Revised Statutes (2 *R. S.*, 129, 201, §§ 21-27) providing for a discovery of books and papers have not been repealed by the Code. By those provisions the power of the court to prescribe by general rules the proceedings to compel discovery is so limited as to preserve this right to notice; and the power to make general rules given by the Code (§ 470) is not large enough to authorize a rule taking it away. (*Id.*)

5. Accordingly, *held*, that rule 20 of the supreme court, in so far as it authorizes the granting of a rule absolute without notice, giving effect to an order for discovery, which imposed as a penalty for non-compliance with it, the striking out of the defendant's answer, is unauthorized and void. Also, that the same was not validated by the provision of the act relating to the supreme court, &c. (*chap.* 408, *Laws of 1870*), legalizing certain rules of the supreme court. (*Id.*)

DIVORCE.

1. An issue of fact in an action for a divorce from a marriage con-

tract on the ground of adultery, must be tried by a jury, unless a jury trial be waived or a reference be ordered by the consent of both parties. (*Deitz* agt. *Deitz*, *ante*, 114.)

2. A former wife is not entitled to dower in land, the title to which was acquired by the former husband subsequent to a judgment, in favor of the wife, in an action for divorce on the ground of the adultery of the husband. (*Kade* agt. *Lauber*, *ante*, 382.)

DURESS.

1. The refusal to pay over a sum of money due a party unless he executes a release of all other claims against the party paying it, does not constitute legal duress, which must be either of the person, or threats of personal injury. The mere withholding of goods or money which can be recovered by action is not. (*Miller* agt. *Coates*, 2 *Hun*, 156.)

E.

EASEMENT.

1. Where the plaintiff has had full and undisturbed possession and enjoyment of an easement or right of way, accepted by the original grantee, and used by him and those claiming under him for over twenty years, over a strip of land laid out on a city map as a proposed street, and upon which his land is bounded to the center, cannot sustain an action against an adjoining owner opposite, whose land is also bounded to the center of said proposed street, for a judgment requiring the defendant to remove all obstructions from one-half of said proposed street, and that the same be considered as dedicated to the public

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and to be used as a public street. (*Grinnell* agt. *Kirland*, ante, 17.)

2. Especially where no acceptance by the public authorities has been received, and no request made for the opening of said street. (*Id.*)

ELECTION.

1. The canvassers' certificate of election is not conclusive but may be annulled, and overthrown by the oral evidence of witnesses. (*People* agt. *McGuire*, 2 *Hun*, 269.)

EQUITY.

1. A recovery in an equitable action cannot be defeated by an independent counter-equity in favor of defendant, which is insufficient to found an action and consequently to predicate a counter-claim upon. Each claim must stand upon its own merits, although arising out of the same general transaction. (*Canaday* agt. *Stiger*, 55 *N. Y. R.*, 452.)

ERROR (WRIT OF).

1. A writ of error in a criminal case brings up for review only questions of law raised by exceptions properly taken upon the trial. This court has no power to reverse the judgment upon the ground that the verdict was against the weight of evidence. (*Donohue* agt. *People*, 56 *N. Y. R.*, 208.)

EVIDENCE.

1. In an action to recover on a life policy of insurance, where the declarations made by the general agent of the defendant some six weeks previous, to prove that an agreement was then made between the assured and the general agent

to extend to a certain future day the payment of the premium which had become due, on the policy, and by which agreement thus proved the defendant (the principal) was bound. (*Dean* agt. *Atna Life Ins. Co.*, ante, 36.)

2. *Held*, that such declarations of the general agent were not competent evidence of the existence of the agreement for the extension of the time of payment of the premium. But after this evidence was all in, without objection, the defendant moved for a nonsuit on the ground that it was not proved that the condition of the policy, as to payment, was waived and the time of payment extended by the defendant or any person authorized to do so upon its behalf. The motion was denied and the defendant excepted. (*Id.*)

3. *Held*, that if this objection had been broad enough to present the question whether the agent's declarations were competent evidence to show an extension of the time for the payment of the premium against the defendant, it would have been in time although the proof of them was received without objection. (*Id.*)

4. Neither this motion nor the ground specified in its support, nor any other objection taken during the trial, presented that question. And as it was not raised at any time during the trial, it was necessarily waived when the case was submitted to the jury. The defendant had the right to have the case tried, if it so elected, on incompetent evidence; and the omission at any time to object is conclusive evidence of such waiver. (*Id.*)

5. Where the proof is entirely insufficient to establish the fact that a certain newspaper, to publish legal notices, was designated by the comptroller of the city of New York for a certain year, and that

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the assessment proceedings in a street matter took place during that year, it is irregular to order the assessment vacated. (*Matter of Keteltas, ante, 116.*)

6. A witness cannot give evidence of the market value of honey, generally, which he has never seen, but such as had been described by a former witness which he heard, without confining it to the quality thus described. (*Todd agt. Warner, ante, 234.*)

7. The most that could have been legitimately obtained from the witness would have been an answer to the hypothetical question: What was second and third-class honey worth per pound? The former witness having classified the honey as first and second-class honey in his evidence. (*Id.*)

See COMMON CARRIER.

Shelton agt. Merchants' Dispatch Trans. Co., ante, 257.

8. Where on the trial incompetent evidence is admitted, after objection, which might affect the minds of the jury, the subsequent direction of the judge, in his charge to the jury, that such evidence be disregarded by them, does not cure the error in first receiving it. (*Newman agt. Goddard, ante, 363.*)

EXAMINATION OF A PARTY.

1. Before the enactment of subdivision 7 of section 401 of the Code, the affidavit of a party could not be compulsorily procured by his adversary for the purpose of enabling the latter to use it upon a motion. (*Spratt agt. Huntington, ante, 97.*)
2. And subdivision 7 of section 401 does not modify nor repeal the precedent prohibition contained in section 389 of the Code, which declares that a party shall not be examined on behalf of the adverse

party, except in the manner prescribed by chapter 6 of the Code, and that merely provides for his examination as a witness in the action. (*Id.*)

3. No difficulty stands in the way of maintaining both provisions at the same time; and when that can be done, the latter statute does not repeal or supersede the earlier one relating to the same general subject-matter. (*Id.*)

4. Where an order is made requiring the plaintiff to appear before a referee, at the instance of the defendant, to make an affidavit to be used on a motion, which the plaintiff refuses to do, and the defendant procures a further order that the plaintiff make such affidavit, and for his punishment, in case of further disobedience, the plaintiff, on moving to vacate the first order as irregular, is entitled to have his motion granted; and this necessarily vacates the second order, which is founded on the first. (*Id.*)

5. The examination of a party before trial under sections 190 and 191 of the Code, does not authorize the issuing of a subpoena *duces tecum* to bring up the party's books and papers. They are distinct proceedings. (*De Bary agt. Stanley, ante, 349.*)

EXCEPTIONS.

1. Where a referee finds, as a legal conclusion, that one party is entitled to recover of the other a specified sum, an exception thereto raises the question whether the successful party is entitled to recover the entire sum. (*Briggs agt. Boyd, 56 N. Y. R., 289.*)

EXCISE LAW.

1. Damages arising from injuries to property and loss of property sus-

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tained by an habitual drunkard, may be recovered under the excise law against any person unlawfully making the sale of the liquor by means of which the injuries arose. The statute in general terms declares it unlawful to sell intoxicating liquors to any person guilty of habitual drunkenness (2 R. S. [5th ed.], 944, § 21). (*Kilburn* agt. *Coe*, *ante*, 144.)

2. Such injury to the habitual drunkard being against his property or estate, as distinguished from a mere injury to his person, an action for damages may be brought, in case of his decease, in favor of his executors or administrators of his estate (3 R. S. [5th ed.], 746, § 1). (*Id.*)

EXECUTION.

See MARINE COURT.

Matter of Lippman, *ante*, 359.

1. An execution issued to a deputy sheriff, who is the judgment debtor in the execution, cannot be executed against himself. (*Holbrook* agt. *Brennan*, *ante*, 519.)
2. It would be absurd to hold that when the sheriff is forbidden by statute to execute process where he is a party, that he may authorize a deputy to execute process against himself; and this he does where he delivers an execution against the deputy to the deputy to execute against himself. (*Id.*)
3. And where in such case the deputy returns the execution *nulla bona*, when it is made to appear that the deputy had property which might have been, during the life of the execution, applied on the execution, the sheriff will be held liable in an action for a *false return*. (*Id.*)
4. Where a judgment creditor attempts to redeem premises sold under a prior judgment, on or after

the last day of the fifteen months allowed by law for that purpose, such redemption to be valid must take place at the sheriff's office of the county where the sale took place. (*Morse* agt. *Purvis*, 2 *Hun*, 542)

5. An execution against property gives the sheriff authority and power over the debtor's goods and chattels, but vests him with no right or title thereto or interest therein until a levy is made; they are bound by the execution from the time of its delivery for the benefit of the execution creditor, so as to secure him a lien thereon; for the enforcement and satisfaction of this lien, however, it is necessary that the officer make an actual levy and sale, and such levy must be made during the life of the execution; no constructive levy can arise or be presumed from the mere fact of the delivery of the execution. (*Hathaway* agt. *Howell*, 54 *N. Y. R.*, 97.)
6. The mere delivery of an execution to a sheriff, without any levy by virtue thereof during its life, does not justify him in seizing the debtor's goods after the return day; the writ then ceases to be of any force, and all rights of the sheriff under it are at an end. (*Id.*)
7. An execution in usual form, reciting a judgment of a county court, and signed by an attorney, was delivered to defendant, as sheriff, for collection. The execution was issued upon a transcript of a justice's judgment filed and docketed in the county clerk's office. *Held*, that conceding the execution to be void because not signed by the clerk as required by section 64 of the Code, yet, inasmuch as nothing appeared therein to notify the sheriff that the judgment was originally a justice's judgment, the process was sufficient to protect him in levying upon and holding the property of

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the judgment debtor. (*Hill* agt. *Haynes*, 54 N. Y. R., 153.)

8. *It seems*, however, that the signing of such an execution by the clerk, is a mere ministerial act; and whether the lack thereof is a curable irregularity or renders the execution void, *quere*. (*Id.*)
9. An order denying a motion to set aside an execution is not reviewable in this court. (*Underwood* agt. *Green*, 56 N. Y. R., 247.)
10. An attorney issuing an execution upon a judgment is liable to the sheriff for his fees thereon. (*Campbell* agt. *Cothran*, 56 N. Y. R., 279.)
11. A sheriff's poundage is in the nature of commissions, and upon a money execution he is not entitled thereto until the money is collected, and his commissions are to be measured by the sum then realized, save where, after a levy, he is prevented from fully executing the writ by the act and interference of the party in whose favor it is issued. (*Id.*)
12. Where, therefore, a sheriff has levied upon property sufficient to satisfy an execution, and before the money is actually collected, the judgment is modified or reversed, the sheriff is not entitled to fees on the whole sum directed to be collected, but only on the sum actually collected. (*Id.*)

EXECUTORS AND ADMINISTRATORS.

1. Neither the legislature nor the courts have power to confer jurisdiction on surrogates over the estates of living persons. (*Roderigas* agt. *East River Savings Inst.*, ante, 166.)
2. The foundation of the theory of distribution of estates, whether under statutes of distribution or according to provisions of wills,

rests upon the event of death. (*Id.*)

3. A savings bank, therefore, which pays out deposits to a person appointed administratrix of the estates of two persons, depositors, when both depositors at the time are living, have no protection against the depositors, although it took two separate receipts from the administratrix at the time of payment. (*Id.*)

See WILLS.

Clark agt. *Coles*, ante, 266.

4. An administratrix has no right to make a gift to any person of any part of the assets of the estate. Neither will the law give effect to such an illegal alienation. (*Powers* agt. *Powers*, ante, 389.)
5. It is an improper act for an administratrix to sell a portion of the assets of the estate, and in payment take a conveyance of property to herself individually for her own use and benefit and ultimate disposition. (*Id.*)
6. Where the plaintiff, just after reaching his majority, conveyed to his mother, individually, his share in his deceased father's real estate, for the expressed consideration of \$5,000, and took from his mother, as administratrix, a bill of sale of a store of goods, with the good-will of the business, belonging to his father's estate, for the expressed consideration of \$5,000. (*Id.*)
7. *Held*, that the plaintiff had no discharge for his liability to his father's estate for the store conveyed to him. (*Id.*)
8. *Held*, also, that the deed to the mother was a distinct transaction and did not operate as a discharge; and consequently there appeared to be a failure of consideration for the deed itself. (*Id.*)

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9. The supreme court has the power to appoint such persons as they may see fit, executors of a will to fill the vacancies caused by the death of other executors. (*Bronson* agt. *Bronson*, ante, 481.)
10. It is in accordance with the practice of this court, and of the court of chancery, to make such appointment upon petition. (*Id.*)
11. The executors, as trustees of a large estate, have the right in its management, to charge the estate with the expenses of clerk hire and office rent. And it is not a breach of good faith for one of the executors, who has the custody of the books, to make such charges, although strenuously objected to by his co-trustees. (*Id.*)
12. The refusal of a trustee having the custody of the books and papers of the estate, to deliver them up to his two co-trustees upon their joint demand, cannot be sustained. But this refusal is not such misconduct as to call for his removal from the trust. (*Id.*)
2. Although the rule declared in *Bennett* agt. *Judson* (21 N. Y., 238) that one who, without knowledge of its truth or falsity, makes a material misrepresentation, is guilty of fraud in legal contemplation as much as if he knew it to be untrue, is qualified but not overruled, the injured party is not compelled to prove that the person making the representations knew them to be false; if he assumes or intends to convey the impression that he had actual knowledge of their truth, when conscious that he has not such knowledge, it is enough. (*Id.*)
3. The impressive array of facts in this case would seem to be quite conclusive upon the correctness of the findings of the referee charging the defendant with having made false representations, and for an improper purpose. (*Id.*)

See CLAIM AND DELIVERY.

Solomon agt. *Van Fraag*, ante, 338.

FINDINGS OF LAW AND FACT.

- F.
- FALSE REPRESENTATIONS.**
1. It is now settled by the court of appeals that an action, founded upon the deceit and fraud of the defendant, cannot be maintained in the absence of proof that the defendant believed, or had reason to believe, at the time he made them, that the representations made by him were false, and for that reason fraudulently made, or unless it be shown that he assumed or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge. (*Indianapolis, Peru, &c., R. R. Co.* agt. *Tyng*, ante, 198.)
 2. As a foundation for such application, it is the duty of the party to request the referee specifically to find such facts and conclusions as shall, upon the evidence, be regarded as material to the issue. (*Id.*)
 3. Should the application be denied, the materiality of the findings
 1. It is the duty of a referee, if requested so to do, to pass one way or the other upon every question of fact involved in the determination of a material issue, whether the evidence be conflicting or uncontradicted, and a refusal so to do is error which may be reached and corrected by application to the court to send the case back to the referee for specific findings upon such questions. (*Meacham* agt. *Burke*, 54 N. Y. R., 217.)

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asked for can be determined at general term or in the court of appeals, on appeal from the judgment. (*Id.*)

4. If a referee finds a fact wholly unsupported by evidence, or refuses to find a fact which the contradicted evidence establishes, it raises a simple question of law, which may be dealt with in the ordinary form in the court of last resort. (*Id.*)

FORECLOSURE.

1. Where a mortgage was foreclosed by advertisement, and notices of sale, in due time and form, were served on the personal representatives of the mortgagor, by inclosing the same to them, respectively, in a proper envelope, sealed and addressed to them at their residences, as follows: Mrs. Minerva George, Martinsburgh, N. Y.; Chester Shumway, administrator, &c., Martinsburgh, N. Y.; Lorenzo Shumway, administrator, &c., Martinsburgh, N. Y.; *held*, that the service was sufficient, and the object of the statute was fully complied with. (*George* agt. *Arthur*, 2 *Hun*, 406.)

FRAUD.

1. Fraudulent representations made by an infant, to induce another to enter into a contract with him, will not give it validity. (*Stowell* agt. *Shapter*, 54 *N. Y. R.*, 249.)

FRIVOLOUS PLEADING.

1. To justify a judgment for the plaintiff on account of the frivolousness of the answer, the point presented should be so clear as to require no argument. (*Griffin* agt. *Todd*, *ante*, 15.)

2. This is not the case where the plaintiff complains for goods sold and delivered on a credit which is alleged to have been obtained by fraud, and the defendant not only denies the cause of action, but in one of his defenses specifically puts in issue the allegation of fraud. (*Id.*)

3. The question whether the plaintiff can or cannot recover for goods sold without proving the fraud is a disputable and debatable one. (*Id.*)

4. Where the defendants, in their answer to an action to foreclose a mortgage for non-payment of interest, denied that the defendants were in default in the payment of \$280, &c., which became due and payable on the 27th day of September, 1873, and nowhere averred that the interest had been paid, nor denied that the plaintiff was entitled to the amount claimed to be due, nor was any material fact put in issue by the answers, *held*, that the answers were frivolous. (*Excelsior Savings Bank* agt. *Campbell*, *ante*, 347.)

H.

HABEAS CORPUS.

1. The courts have jurisdiction to interfere by writ of *habeas corpus* and to examine the grounds upon which the executive warrant for the apprehension of an alleged fugitive from justice from another State is issued; and, in case the papers are defective and insufficient, to discharge the prisoner. (*People ex rel. Lawrence* agt. *Brady*, 56 *N. Y. R.*, 182.)

2. Previous adjudications in proceedings by *habeas corpus* are no answer to a new writ where the relator is restrained of his liberty. The decision under one writ refusing to discharge him, does not bar

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the issuing of a second writ by another court or officer. (*Id.*)

I.

INJUNCTION.

1. In reference to the plaintiff's right to place his sign in a particular locality at the entrance of the rear offices leased to and occupied by him, where his lease contains no privilege or direction on the subject, he cannot arbitrarily claim the right to place his sign in a particular locality selected by him, and the continuance of an injunction thus protecting him. (*Knoepfel* agt. *Kings County Fire Ins. Co.*, ante, 208.)
2. He should exhaust the means of an amicable arrangement within his reach with the other tenants and the landlord before coming to a court of equity in such a case. (*Id.*)
3. Public bodies and public officers may be restrained by injunction from proceeding in violation of law to the prejudice of the public or to the injury of individual rights; as against them, however, a court of equity only exercises its peculiar jurisdiction to prevent a breach of trust affecting public franchises, or some illegal act under color or claim of right affecting injuriously the property rights of individuals, and to entitle a plaintiff to this remedy a clear, legal and equitable right to the relief demanded must not only be shown, but that such a breach of trust or illegal act is being done by defendant, or is threatened and imminent. (*People ex rel.* agt. *Canal Board*, 55 *N. Y. R.*, 390.)
4. The courts cannot be called upon to pass upon the validity of a law upon a mere suggestion that it is void, and that possible action may be had under it, and in advance of any proceedings had or threatened by the officials who, if the act were valid, would be called upon or authorized to act. (*Id.*)
5. When the state, as plaintiff invokes the aid of a court of equity, it is subject to the rules applicable to ordinary suitors. (*Id.*)
6. Injury, material and actual, not fanciful, theoretical or merely possible, must be shown as the necessary or probable results of the action sought to be restrained. (*Id.*)
7. Courts cannot restrain legislation directly or indirectly, and an injunction cannot be based upon the assumption that the legislature may, by an appropriation of public moneys, give effect to an illegal act of a public body. (*Id.*)
8. Nor will the courts restrain a citizen from petitioning the legislature, or any public body, or asking action of either in his behalf, whether with or without authority of law, unless his doing so would violate some covenant or agreement with others. (*Id.*)
9. Where an injunction was obtained by the plaintiff, restraining the defendants from taking any steps to foreclose a chattel mortgage upon property belonging to the plaintiff; and, on appeal from the order granting the injunction, it appeared that the plaintiff was insolvent, and that no security had been given as required by the Code; *held*, that the order should be affirmed, on the plaintiff's filing security in the form required by section 222 of the Code, and by the rules and practice of this court, within ten days after service of a copy of the order to be entered herein; but if such security should not be so filed, that then the order appealed from be reversed. (*N. Y. Attrition Pulverizing Co.* agt. *Van Tuyl*, 2 *Hun*, 373.)

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10. The plaintiff was the owner of several patents relating to the manufacture of gas, his process being known as "Wren's process," "Wren's Gas-works" and "Wren's process in making gas." The defendant acquired the right, under another patent taken out by Mrs. Wren, plaintiff's wife, to manufacture gas in the state of Massachusetts, by what is generally called "Wren's patent or process." Letters were written by the defendant, to persons in the state of Massachusetts, who were negotiating with the plaintiff for the introduction of his gas-works, in the following form: "We are informed you are about negotiating for gas-works under the 'Wren's patent or process;' we desire to inform you that your city and state are our territory, and none excepting our company have any right or authority to dispose of, contract for, or erect any works therein, under this process; any information you may desire in reference thereto will be furnished you by application in writing (or in person) at the office of the company." In an action brought by the plaintiff to restrain the publication and sending of such letters, *held*, that he was not entitled to recover. That the letters meant no more than that the defendant would not permit infringements of its patent. (*Wren agt. Cosmopolitan Gas Company*, 2 *Hun*, 686.)
11. A court of equity has jurisdiction to restrain, by injunction, the prosecution of a multiplicity of suits. (*Third Av. R. R. Co. agt. Mayor, &c.*, 54 *N. Y. R.*, 159.)
12. Defendants had commenced seventy-seven actions against plaintiff to recover penalties, prescribed and imposed by city ordinance, for running cars without a license. Plaintiff brought this action to restrain the prosecution of more than one of said actions until that one could be finally heard and determined. Defendants demurred, the demurrer was overruled, and judgment rendered for plaintiff. *Held*, no error; that as the justice's court had no power to grant the relief sought, or to consolidate the actions, and as the prosecution of all the suits would be unnecessarily oppressive, the interference of a court of equity was properly invoked and exercised. (*Id.*)
13. The remedy by injunction is to be resorted to, as a general rule, only where an injury, without adequate redress, may result if the writ be not employed. (*Savage agt. Allen*, 54 *N. Y. R.*, 458.)
14. An action cannot be maintained to restrain by injunction the proceedings in another suit in the same or another court, between the same parties, where the relief sought may be obtained by a proper defense in such suit. (*Id.*)
15. The danger of judicial proceedings is not an injury justifying an injunction. (*Wolfe agt. Burke*, 56 *N. Y. R.*, 115.)
16. A person charged with an infringement of a trade mark and against whom an action is threatened and about to be commenced, cannot maintain an action to restrain the commencement of such threatened action, and the fact that an injunction against him would be a serious injury to his business furnishes no justification therefor. (*Id.*)
17. It is no ground for equitable interference that the decision may result in determining the law in a way which will or may have the effect of preventing suits between other parties. (*Id.*)
18. Equity will restrain proceedings upon a verdict or the collection of a judgment, where it is made to appear, by facts of which the party could not avail himself as a defense, that the enforcement thereof

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would be contrary to equity and good conscience. (*N. Y. & H. R. R. Co. agt. Haws*, 56 *N. Y. R.*, 175.)

19. The party is not bound to seek his relief by motion in the original action, but may institute an action for that purpose. (*Id.*)

20. Equity will not interpose upon the ground that the verdict or judgment was erroneous. The error must be corrected, if at all, in the action in which it occurred. (*Id.*)

INSURANCE.

1. The law authorizing reinsurance was intended that when reinsurance is made it should be made in the name of and for the benefit of the company, and not of individual policyholders. (*Casserty agt. Manners*, ante, 219.)

2. Any construction placed upon the law authorizing reinsurance which would allow reinsurance in favor of the policyholder, brings it into conflict with the statute forbidding a corporation from giving preferences; whereas, if the reinsurance is made for the benefit of the company, the two statutes do not conflict. (*Id.*)

3. The allowing reinsurance is not for the benefit of individual policyholders, but for the benefit of the whole body. (*Id.*)

See REFORMATION OF CONTRACT.

McHugh agt. Imperial Fire Ins. Co., ante, 230.

4. Where the policy of insurance makes it a condition precedent to plaintiff's right of recovery that he should deliver to the company a verified account in writing of his loss within ten days after the loss, it becomes a part of the contract of insurance, and effect should be fairly given to it as to every other part of the contract.

(*Underwood agt. Farmers' Joint Stock Ins. Co.*, ante, 367.)

5. Where there is a conflict in the evidence on the trial that this condition has been waived by the defendant, it is error for the judge to decide, as matter of law, that it has been waived, and, hence, that non-compliance with it, on the part of the plaintiff, does not defeat the action. (*Id.*)

6. The evidence in such case should be submitted to the jury to determine whether there has been a waiver or not. (*Id.*)

7. Whether there can be any waiver of a condition precedent, except there be in the case an element of estoppel, discussed, but not decided by the court. (*Id.*)

8. A court of equity has jurisdiction to order a surrender and cancellation of a policy of insurance alleged to have been obtained by fraud, and held by the promisee, upon which no action has been brought. (*Globe Mu. Life Ins. Co. agt. Reals*, ante, 502.)

9. Whether the power of the court shall be exercised belongs to the trial of the case; rather than a preliminary examination of the complaint alone upon demurrer. (*Id.*)

10. The exercise of the power of the court of equity depends upon a sound discretion, applicable to all the circumstances of the case made by the proofs, when the case is fully before the court. (*Id.*)

J.

JANITOR.

1. A janitor of a district civil court in the city of New York is not an officer, but an employee. (*Sullivan agt. Mayor, etc.*, *N. Y.*, ante, 238.)

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2. Consequently where such janitor received his appointment from the common council and his compensation was fixed by them, the board of estimate and apportionment cannot change it by a resolution under the charter of 1873. (*Id.*)

JOINDER OF ACTIONS.

1. The rule existing prior to the Code, that where in an action for specific performance, it appears that plaintiff was aware before the commencement thereof that defendant could not perform, equity would not retain the suit for the purpose of awarding damages, is abrogated by the Code that authorizes the uniting of causes of action, both legal and equitable, arising out of the same transaction (§ 167). (*Sternberger agt. McGovern*, 56 N. Y. R., 12.)
2. Where, therefore, the complaint states facts giving a cause of action for specific performance of a contract; also, one for damages for breach of the contract, plaintiff is entitled to have both tried if necessary to obtain his rights, and a failure to show a right to the equitable relief sought does not defeat his right to the legal remedy. (*Id.*)
3. A cause of action on contract for a breach of a covenant of quiet enjoyment contained in a lease, and one in tort for unlawfully entering the apartments leased and injuring the lessee's property therein, cannot be joined. (*Keep agt. Kaufman*, 56 N. Y. R., 332.)

JUDGMENT.

1. The court has control over its own judgments and decrees, and will vacate a decree which has been improperly obtained, upon such notice as in view of the circumstances of each case may be

deemed just and proper. (*Dinsmore agt. Adams*, ante, 274.)

2. This power is inherent in the court and is not limited by section 174 of the Code, which has reference merely to ordinary defaults. (*Id.*)
3. Where, on a motion to vacate a judgment or decree, the affidavits are conflicting, the court must look to the record and the undisputed facts. (*Id.*)
4. The defendant gave to the plaintiff a bill of sale of a gold watch and chain, five colts and a note. Subsequently the defendant sold the colts to one Johnson, who, at the request of defendant, brought an action against the plaintiff herein to obtain possession of the colts, claiming that the bill of sale was given as collateral security to a note which had been paid, and recovered judgment therein. This action was brought to recover the watch and chain, the plaintiff claiming under the said bill of sale. *Held*, that the judgment in the action brought by Johnson, operated as an estoppel, and barred a recovery by the plaintiff in this action. (*Bush agt. Knox*, 2 Hun, 576.)
5. Where a judgment, recovered by default against several defendants as partners, is opened by one only, and set aside and the complaint dismissed as to him, money collected under an execution issued on such judgment by sale of partnership property, should not be paid to the plaintiff in such action; and a subsequent attaching creditor of the partnership is entitled to receive it. (*Phillips agt. Wheeler*, 2 Hun, 603.)

JURISDICTION.

1. This court has no jurisdiction of an action brought against a railroad company organized in this

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- state for negligently causing sparks and burning wood to be thrown on the plaintiff's trees and plants, and setting fire to and burning and damaging the trees and plants growing on the lands of the plaintiff, in the state of New Jersey, and ruining and destroying them. (*Huermund agt. Erie Railway Co., ante, 55.*)
2. Trespass for injuries to real estate or its corporeal hereditaments, cannot be brought beyond the jurisdiction where the land is situated. (*Id.*)
 3. Neither the legislature nor the courts have power to confer jurisdiction on surrogates over the estates of living persons. (*Rodrigas agt. East River Savings Inst., ante, 166.*)
 4. The foundation of the theory of distribution of estates, whether under statutes of distribution or according to provisions of wills, rests upon the event of death. (*Id.*)
 5. The court has control over its own judgments and decrees, and will vacate a decree which has been improperly obtained, upon such notice as in view of the circumstances of each case may be deemed just and proper. (*Dinsmore agt. Adams, ante, 274.*)
 6. This power is inherent in the court and is not limited by section 174 of the Code, which has reference merely to ordinary defaults. (*Id.*)
 7. Where, on a motion to vacate a judgment or decree, the affidavits are conflicting, the courts must look to the record and the undisputed facts. (*Id.*)
 8. It is now settled that the courts of this state will entertain jurisdiction of actions for personal injuries committed abroad, when both or either of the parties are citizens of the United States. (*Neuman agt. Goddard, ante, 363.*)
 9. Where a judge, holding a court of limited or general jurisdiction, proceeds officially against a party, knowing that he acts without jurisdiction, having in fact no jurisdiction whatever, he is liable in an action, at the suit of the party injured, for such acts. (*Lange agt. Benedict, ante, 465.*)
 10. Where the judge holding the circuit court of the United States for the southern district of New York, upon the trial and conviction of the defendant in an indictment for a felony, sentenced him to pay a fine of \$200, and be imprisoned for the term of one year, which fine was immediately paid by the defendant, and he then went to prison, and subsequently was brought up on *habeas corpus* before the same judge, who, on reference to the statute, ascertained that the extreme penalty for the offense was imprisonment for the term of one year, or a fine of \$200, and the judge thereupon resentenced the defendant to one year's imprisonment; and, subsequently, the case was brought before the supreme court of the United States, upon *certiorari* and *habeas corpus*, which court: (*Id.*)
 11. *Held*, that the record of the circuit court's proceedings showed that at the moment the second sentence was rendered, that, in that very case, and for that very offense, the defendant had fully performed, completed and endured, one of the alternate punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish that offense was at an end. The court could render no second judgment against the defendant. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the constitution, and by the dearest principles of personal rights which both of them are supposed to maintain. (*Id.*)

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13. The defendant in that case, and the plaintiff in this, brought an action against the judge who re-sentenced him for false imprisonment, claiming \$50,000 damages. The defendant demurred to the complaint on the ground of want of jurisdiction in this court, and that the complaint did not state facts sufficient to constitute a cause of action. (*Id.*)
13. *Held*, that a judge of a court of either a limited or a general jurisdiction who attempts to enforce a judgment, which he knows to have been satisfied, makes himself liable to an action. Demurrer overruled, with leave to answer on payment of costs. (*Id.*)
14. After an action has been tried in a county court, a verdict rendered, and judgment entered thereon, a defendant cannot move to set aside the judgment on the ground that it is not alleged in the complaint that the defendants were residents of the county in which the action was brought. (*Burling* agt. *Freeman*, 2 *Hun*, 661.)
15. The jurisdiction of the state courts over the subject-matter of an action, where it is based upon a contract or is for the recovery of property, real or personal, does not depend upon the means by which plaintiff's title was acquired; and a right to property given by act of congress, may be protected in a state court in the same way and to the same extent as though derived from any other source. (*Cook* agt. *Whipple*, 55 *N. Y. R.*, 150.)
16. The supreme court of this state has jurisdiction in all actions, legal or equitable, brought by an assignee in bankruptcy to recover the estate of the bankrupt, or to determine rights to property claimed by him as such assignee, or in any way affecting the same. (*Id.*)
17. The provisions of the bankrupt act (§§ 1, 2), conferring jurisdiction in such cases upon the district and circuit courts of the United States, were not intended to interfere with and do not exclude the jurisdiction of the state courts. (*Id.*)
18. The right of recovery of property transferred by the insolvent given to the assignee by section 35 of the bankrupt act, is, in no sense, a penalty imposed upon the party receiving it; and the rule that state courts have no jurisdiction of actions for penalties given by acts of congress, has no application to actions to enforce such right. (*Id.*)
19. Where a state court has jurisdiction it is not in its discretion whether to exercise it or not, but it is its duty to do so when called upon in the manner prescribed by law. (*Id.*)
20. Under section 53 of the Code, as amended in 1862 (*sub. 2*), a justice of the peace has jurisdiction of an action for injuries to the person. (*Coultter* agt. *A. M. U. Ex. Co.*, 56 *N. Y. R.*, 585.)

JURY.

1. "The verdict in this action was set aside for irregularity, upon the ground that the successful party placed in the hands of the jury, upon their retiring to consider of the verdict, a certain printed paper, without the consent of the court or the opposite counsel. The action was for a libel, and the paper placed in the hands of the jury was a printed copy of one of the libelous articles counted upon, and which had been given in evidence. The modern rule, as settled in this state, is that, whether any and what papers which have been given in evidence, may be taken by the jury when they retire to deliberate upon their verdict, is a matter within the discretion of the judge before whom the

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action is tried." (*Sanderson* agt. *Bowen*, 2 *Hun*, 153.)

JUSTICE'S COURT.

1. A judgment rendered by a justice's court cannot be reviewed by a common-law certiorari. The only mode of reviewing such a judgment is by appeal, as provided in chapter 5 of the Code, section 351. (*People* agt. *Sleight*, 2 *Hun*, 632.)

2. It is the uniform practice of the courts in reviewing proceedings had before a justice of the peace, if possible, to sustain them by every reasonable and warrantable intendment. (*Schoonmaker* agt. *Spencer*, 54 *N. Y. R.*, 366.)

3. In order to give a justice of the peace jurisdiction of an action commenced by attachment, the creditor is not required to furnish conclusive evidence of the facts relied on. It is sufficient if the proof has a legal tendency to make out, in all its parts, a case for the issuing of the attachment; and if the facts and circumstances disclosed fairly call upon the magistrate for the exercise of his judgment, the proceedings are not void. To defeat his jurisdiction, it must be made to appear that there is a total want of evidence upon some particular point. The rule is the same, whether the question arises in a direct or in a collateral proceeding. (*Johnson, C., dissenting.*) (*Id.*)

4. The provision of the Revised Statutes (2 *R. S.*, 353, § 14, as amended chap. 201, *Laws* of 1848) which provides that actions by the county or town officers of one county in their official capacity against those of another shall be laid in some county adjoining that of the defendants, except that of the plaintiffs, does not include actions in justice's court; and an action therein may be brought, in such a

case, in the county where the plaintiff resides. (*Lapham* agt. *Rice*, 55 *N. Y. R.*, 472.)

5. The provision of section 173 of the Code, authorizing amendments by the court, applies to justice's court. That court has power, therefore, in an action brought jointly by two plaintiffs, to amend by striking out the name of one. (*Id.*)

JUSTICE'S OR DISTRICT COURTS.

1. Where an undertaking with two sureties, who have justified in proper form, is presented to a justice of a district court in the city of New York, for the purpose of the removal of a proper case into the court of common pleas, the justice is bound judicially, to approve the undertaking and sign the order of removal. (*O'Connor* agt. *Moschowitz*, ante, 451.)
2. The justice has no discretion in such a case to refuse to approve and accept of one of the sureties on the ground that he is personally acquainted with him and will not accept him as a responsible surety. (*Id.*)

L.

LACHES.

1. The doctrine of laches, and acquiescence as a bar to an action through lapse of time finds its just application in respect to equitable rights only; as to legal rights mere lapse of time, before an action to enforce them, is of no moment, unless it come up to the requirements of the statute of limitations. (*Ormsby* agt. *V. C. M. Co.*, 56 *N. Y. R.*, 623.)

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LIBEL.

1. A defendant in an action for libel may allege the truth of the publication or that it was privileged. (*Kelly* agt. *Tuintor*, ante, 270.)
2. Where the facts stated in a subdivision of the answer do not bring the alleged libelous matter within any of the classes of privileged communications, it cannot be sustained on demurrer as a privileged communication. (*Id.*)
3. The matter stated, however, if it fails to justify the libel, may be given in evidence to mitigate the damages, if it has been pleaded separately for that purpose. (*Id.*)
4. Where the answer alleged that the article, on which the complaint is founded, is, as to the matters complained of, true, "according to the true intent and meaning thereof;" *held*, the defendant had the right to allege the truth as a defense, and that the mere surplusage of the last words, quoted, did not render it a defective pleading. (*Id.*)

LIMITATION OF ACTIONS.

1. The statute of limitations acts only upon the remedy; it does not impair the obligation of a contract, or pay a debt, or produce a presumption of payment, but is merely a statutory bar to a recovery. It is a shield and not a weapon of offense, and so is ineffectual where a party seeks affirmative relief based upon allegations of payment. In such case payment in fact must be shown, notwithstanding the statute has barred the right of the other party to recover such payment. (*Johnson* agt. *A. & S. R. R. Co.*, 54 *N. Y. R.*, 416.)

LOST INSTRUMENTS.

1. In an action upon a lost note against the maker, the giving or tendering of a bond of indemnity is only necessary in case the note was negotiable (3 *R. S.*, 406, §§ 75, 76). (*Wright* agt. *Wright*, 54 *N. Y. R.*, 437.)
2. The negotiability of the note will not be presumed, in the absence of any evidence upon that subject; at least, in a case where the evidence tends strongly to show that the maker obtained possession of the note, without consent of the payee. (*Id.*)

LUNATIC.

1. An action to rescind the sale of a farm made to a lunatic, and to cancel the satisfaction of a mortgage given by him, is properly brought in the name of the committee of such lunatic. (*Fields* agt. *Fowler*, 2 *Hun.*, 400.)
2. Leave to sue the committee of the estate of a lunatic, should be granted, when the party applying for such leave shows a case upon which a court of equity would grant relief, if the claim should be established on the trial. (*Master of Wing*, 2 *Hun.*, 671.)

M.

MAGISTRATE.

1. The provisions of the Revised Statutes (§ 8, chap. 2, part 4, title 1), authorizing a magistrate to commit, in default of his giving security to keep the peace, a person who, in his presence, makes any affray, or threatens to kill or beat another, &c., justify the magistrate, within twenty-four hours after he has witnessed the affray, in issuing a warrant, and, without other evidence than his own senses

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furnished him, committing such person, on his failure to give such security. The limitations imposed upon the powers of sheriffs and constables, in similar cases, held not applicable. (*Sands agt. Benedict*, 2 Hun, 479.)

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, malice and want of probable cause for the prosecution must be affirmatively shown. The *bona fide* acts of a party, on advice given by counsel after a full and fair statement of the facts, are evidence of probable cause, however erroneous the opinion may be. (*Richardson agt. Virtue*, 2 Hun, 208.)

MANDAMUS.

1. When an applicant for a mandamus asks for more than he is entitled to, the application is properly denied, though the applicant may be right in other respects. (*People agt. Cady*, 2 Hun, 224.)
2. If a party seeking a writ of mandamus elects to rest his case upon affidavits, the answering affidavits which are neither traversed, nor confessed and avoided, must be taken as true. If the relator desires to controvert or avoid them, he should take an alternative writ, so that upon answer to the return the questions of fact may be tried. (*ALLEN, J.*) (*People ex rel. agt. Brown*, 55 N. Y. R., 180.)
3. Where one has been installed into an office, and is in possession, discharging its duties under color of law, and where his right to the office depends upon the construction of a statute so ambiguous as to be difficult of interpretation, the title to the office should not be determined in a proceeding by mandamus, instituted by another claiming the office, to compel pay-

ment to him of the salary, to which proceeding the one in possession is not a party. (*People ex rel. agt. Lane*, 55 N. Y. R., 217.)

4. As to whether the title to an office ought ever to be tried collaterally on proceedings by mandamus, instituted on behalf of a party out of possession, *quere*. (*Id.*)
5. A mandamus will not lie to compel assessors to make an oath to their assessment roll, as prescribed by the statute (§ 8, *chap. 176, Laws of 1851*), to wit, that they estimated the value of the real estate "at the sums which a majority of the assessors have decided to be the true and full value thereof, and at which they would appraise the same in payment of a just debt due from a solvent debtor," where it appears that, in fact, they have only estimated it at a fraction of its full value. (*People ex rel. agt. Fowler*, 55 N. Y. R., 252.)
6. Whatever duty the assessors may have omitted, they owe no duty, and are not required to commit a crime; and courts will not compel them so to do. (*Id.*)
7. The purpose of the fifty-fifth rule of the supreme court providing that where no plea or demurrer is interposed to a return to an alternative writ of mandamus within twenty days after service of notice, it may be brought on for hearing upon the return at a subsequent term, &c., is to enable defendants in mandamus to compel a hearing on the return, unless the plaintiffs choose to demur or traverse. If plaintiffs waive this right, and both parties proceed to argument on the return, there is no irregularity or want of authority in the court to hear and dispose of the merits of the controversy. (*People ex rel. Waller agt. Board of Supervisors*, 56 N. Y. R., 249.)
8. The merits are to be determined in such case upon the alternative

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mandamus and upon the return. The affidavits upon which the writ was granted are to be laid out of view. (*Id.*)

9. While when a mandamus is brought to a hearing upon the return, without demurrer or plea, merely formal and technical defects in the manner of pleading should be disregarded, yet defects of substance which go to the actual merits of the controversy are not to be disregarded. (*Id.*)

10. Under the provisions of the act of 1870, providing for the publication of the Session Laws (*chap. 215, Laws of 1870, amending § 8, chap. 280, Laws of 1845*), it is the duty of the board of supervisors of each county to designate two newspapers for that purpose which are "of opposite politics, and fairly represent the two principal political parties into which the people of the county are divided;" that papers are of "opposite politics" is not implied of necessity in the requirement that they "fairly represent the two principal parties," the two phrases are not exact equivalents. (*Id.*)

11. A return to an alternative writ alleging the non-performance of this duty, alleged that two newspapers were "duly designated," and that the papers so designated "fairly represent the two principal political parties in said county." *Held*, that the return was bad in substance, and failed to show such a designation as the statute requires. Also *held*, that a citizen of the county had a sufficient interest in the question to authorize him, as relator, to institute the proceedings, that no private or peculiar interest was necessary. (*Id.*)

12. Under the provisions of the act of 1870, "in relation to supervisors of the county of New York" (§ 6, *chap. 190, Laws of 1870*), declar-

ing that "all moneys drawn from the treasury by authority of the board of supervisors shall be upon vouchers for the expenditures thereof, examined and allowed by the auditor and approved by the comptroller," the comptroller cannot be compelled by mandamus to issue his warrant for the payment of an account, audited and allowed by said board, until the auditor has examined and allowed the vouchers. (*People ex rel. Brown agt. Green*, 56 *N. Y. R.*, 476.)

MARINE COURT.

1. In the marine court in the city of New York, when judgments of that court are docketed in the county clerk's office, executions thereon must be issued to the sheriff. On all other judgments, execution may be directed and issued to either the sheriff or to a marshal. (*In the Matter of Lippman*, *ante*, 859.)
2. The general rule of the marine court, adopted November 9, 1874, which requires all other process, except orders of arrest and attachments, to be directed to and executed by the sheriff, contravenes the statute, and must fall before it. That part of the rule in respect to issuing orders of arrest and attachments, to either the sheriff or marshal, is not affected by this decision. (*Id.*)

MARRIAGE.

1. Marriage is established by and founded upon *civil contract*. It is not necessary to its validity that it should be solemnized in any particular form, or that the intervention of any priest or magistrate is at all needed to make the contract binding. (*Wright agt. Wright*, *ante*, 1.)

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2. All that is necessary for its validity in this state is the deliberate consent of competent parties entering into a present agreement to take each other as man and wife. (*Id.*)
3. This contract may be proved like any other fact, either by positive evidence of the agreement, or by evidence from which it may be inferred. (*Id.*)
4. Where a plaintiff has, by the judgment of the court, been convicted of adultery in an action of divorce brought by his wife, and prohibited by the decree from marrying again during the life of his divorced wife, he cannot, while in such contempt, sustain an action against his second wife for divorce on the ground of adultery, although the contract for the second marriage was perfected and solemnized in another state, both parties immediately before and after the marriage being residents of this state. Under our statute, the second marriage must be pronounced absolutely void. (*Marshall* agt. *Marshall*, ante, 57.)

MARRIED WOMAN.

1. Since the enactment of chapter 90, Laws 1860, a married woman is liable for the payment of rent, reserved for the use of premises leased to her. The acquisition of a leasehold estate is substantially a purchase of the term for which the estate is rented, and the rent reserved is the purchase-price. And for that the statute renders married women liable, when such an estate is purchased by them. (*Westervelt* agt. *Ackley*, 2 *Hun*, 258.)
2. Whether married woman must set up the defense of coverture in her answer, in order to have the benefit of it, *quere*. (*Id.*)
3. Where a complaint sets out a cause of action on its face, and the

defendant intends to interpose the defense that the plaintiff is a married woman, and has no separate estate, or carries on no separate trade or business, such defense must be set up in the answer. (*Stevens* agt. *Bostwick*, 2 *Hun*, 423.)

MECHANICS' LIEN.

1. The plaintiff made a contract with the defendant, by which he undertook to furnish all the building stone and brown sand necessary for the erection of fourteen houses upon the lots of the defendant, and to do certain filling specified in the contract, for the sum of \$23,000, to be paid and accepted as follows: By conveying to him, or his assigns, by deed, &c., the second of said houses easterly from Fifth avenue, on the northerly side of Seventy-fourth street, describing the lot and the provisions of the deed by which, and the incumbrances subject to which, the same was to be conveyed, and \$9,000 cash, to be paid as specified in the contract. (*Dowdney* agt. *McCullom*, ante, 342.)
2. Held, that it was the intention of the parties that the plaintiff was to have the lot, subject to the conditions specified in the contract, and \$9,000 cash, in consideration of performance of the contract on his part, and was not obliged to accept \$23,000 cash for the whole, at the election of the defendant. (*Id.*)
3. Also, that the plaintiff had the right to enforce the conveyance of this lot, and in case of the inability or refusal of the defendant to convey it as specified in the contract, to recover its value, although exceeding the sum of \$14,000. (*Id.*)
4. But this relief could not be given to the plaintiff in proceedings to foreclose the mechanics' lien; because such proceeding is entirely

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statutory, and the court can exercise no power except such as is conferred by the statute; that is, to determine the amount due the lienors, to order a sale of the property, distribute the proceeds, to give personal judgment, and to issue execution. (*Id.*)

5. Proceedings to impose and enforce mechanics' liens, have no foundation in common law, but rest and must find support entirely upon the statutes authorizing them. (*Benton* agt. *Wickwire*, 54 *N. Y. R.*, 226.)
6. Within the meaning of the mechanics' lien law for the city of New York, of 1863 (*chap.* 500, *Laws* of 1863), no one is owner who is not contractor, also, for the work performed and materials expended, upon his land; and no lien can be created upon the interest of any person as owner of the premises, unless such person shall have himself, or by his agent, entered into a contract for doing the work, either express or implied. (*Muldoon* agt. *Pitt*, 54 *N. Y. R.*, 269.)

MILITARY SERVICE.

1. When from circumstances it is to be inferred that two discharges from military service are genuine and authentic; and if they are it is evidence that the persons named in them were in the United States military service and entitled to the money payable under them, although for some reason their names did not appear on the muster roll of the company. (*Thompson* agt. *Fargo*, *ante*, 93.)

MISTAKE.

1. Negligence upon the part of one, who, by mistake, pays to another a sum of money, to which the lat-

ter is not entitled, does not defeat the right of action of the former to recover back the money so paid. (*Lawrence* agt. *Am. Nat. Bank*, 54 *N. Y. R.*, 482.)

MORTGAGE FORECLOSURE.

1. In an action to foreclose a mortgage which by its terms provides that in case the taxes upon the mortgaged premises should remain unpaid on the first of February in any year that the whole principal sum secured to be paid by the mortgage should become due, the court has no more power to relieve a party against such a default than it would have if the terms of the mortgage made the principal money due and payable on default of payment of the interest according to the condition of the mortgage. (*O'Connor* agt. *Shipman*, *ante*, 126.)
2. Where a purchaser of a leasehold interest for a term of years at a mortgage foreclosure sale of premises in the possession of tenants at the commencement of the action, and who remain in possession at the time of the sale, but not made parties to the foreclosure proceedings, he is not bound to complete his purchase and take a title. (*Hirsch* agt. *Livingston*, *ante*, 243.)
3. Where merits are shown, and the insolvency of the attorney may be inferred, the court will let in the defendant on the merits, on a motion to set aside a judgment of foreclosure. (*Powers* agt. *Trenor*, *ante*, 500.)
4. Where the right claimed by the defendant to have the service and judgment set aside without terms, it appears that the right of merits is against the defendant, his motion will be denied. (*Id.*)

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MOTION.

1. Where the court allows any person to appear and be heard upon the argument of a motion, in the decision of which he is interested, such hearing is as effectual as though such person had received notice of the motion, and had been named as a formal party to it; and he is fully concluded by the disposition which the court may make of such motion. (*Jay* agt. *De Groot*, 2 *Hun*, 205.)
2. The Code, section 401, subdivision 4, providing that motions upon notice must be made within the district within which the action is triable, &c., does not apply to a case where one motion is necessarily made and entitled in several actions pending in different counties and judicial districts. The practice in such cases must be determined under Rule 97. (*Phillips* agt. *Wheeler*, 2 *Hun*, 608.)

MOTIONS AND ORDERS.

1. Where upon the sale of real estate a portion of the purchase-price was paid in railroad bonds, and an action was brought by the vendor to recover the amount so paid, as unpaid purchase-money, and to charge the same as a lien upon the land sold, on the ground of fraudulent representations upon the part of the vendee as to said bonds, in which action a notice of *lis pendens* was filed, *held*, that the action affected the title to real property, and that an order directing the removal from the files and the cancellation of said notice was error. (*Mills* agt. *Bliss*, 55 *N. Y. R.*, 139.)
2. It seems that such an equitable action is sustainable; but, whether so or not, the question is not determinable upon an interlocutory motion. (*Id.*)
3. After a party has appeared and pleaded in an action he is entitled to notice, and has a right to be heard before the granting of an order striking out his pleading and precluding him from prosecuting or defending the action. (*Rice* agt. *Ehle*, 55 *N. Y. R.*, 518.)
4. He cannot be deprived of this right by an order affixing as a penalty for the violation of its mandate the striking out of his pleading. Before the order can be made absolute or an absolute order based thereon, it must be made to appear to the court, upon notice to the party, that he has failed to comply. (*Id.*)
5. The provisions of the Revised Statutes (2 *R. S.*, 129, 201, §§ 21-27) providing for a discovery of books and papers have not been repealed by the Code. By those provisions the power of the court to prescribe by general rules the proceedings to compel discovery is so limited as to preserve this right to notice; and the power to make general rules given by the Code (§ 470) is not large enough to authorize a rule taking it away. (*Id.*)
6. Accordingly *held*, that Rule 20 of the supreme court, in so far as it authorizes the granting of a rule absolute without notice, giving effect to an order imposing as a penalty, for non-compliance with it, the striking out of defendant's answer, is unauthorized and void. Also that the same was not validated by the provision of the act relating to the supreme court, &c. (*chap.* 408, *Laws of 1870*), legalizing certain rules of the court. (*Id.*)
7. An order denying a motion to set aside an *ex parte* order striking out an answer is reviewable in this court (*Code*, § 11, *sub.* 2). (*Id.*)
8. After a trial of an equity action by and a submission thereof to the court, it has power while it remains in its hands under advisement, of its own motion to direct

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certain issues therein to be passed upon by a jury, and an order to that effect is not reviewable by this court. (*Brinkley* agt. *Brinkley*, 56 N. Y. R., 192.)

9. This power is not restricted or affected by section 267 of the Code requiring the judge to make and file his decision within a specified time; this is necessarily with the implied qualification that no other disposition is made of the case. (*Id.*)
10. An order of general term affirming an order of the court at circuit granting a motion made on the judge's minutes, to set aside a verdict as against evidence, is not appealable to this court. (*Fullon* agt. *B. C.*, &c., *R. R. Co.*, 56 N. Y. R., 652.)
11. An application to the special term of the supreme court to open a judgment and allow a defendant to come in and defend is addressed to the discretion of the court. The power to review that discretion belongs to the general term. This court has no power to review the decision of the latter. (*Depew* agt. *Devey*, 56 N. Y. R., 657.)
12. An order appointing a referee and requiring one who has refused to make an affidavit, claimed to be necessary for the purposes of a motion, to appear before such referee and make affidavit (*Code*, § 401), does not affect a substantial right of the witness and is not reviewable in this court. (*Rogers* agt. *Durant*, 56 N. Y. R., 669.)
13. *It seems* that the supreme court has power, on motion for restitution, where the judgment of reversal grants a new trial in order to guard the respondent from loss on account of the insolvency of the appellant, to make such order as it shall deem proper for the withholding and for the disposition and safe keeping of the moneys collected, pending the litigation. (*Marcin* agt. *B. I. M. Co.*, 56 N. Y. R., 671.)
14. An order at circuit, directing a case and exceptions to be heard in the first instance at general term, may be vacated at special term, and permission given to move for a new trial upon the case and exceptions at special term. (*Post* agt. *Hathorn*, 54 N. Y. R., 147.)
15. The provision of section 265 of the Code, that the judge trying the cause may direct exceptions to be heard in the first instance at general term, and judgment in the mean time suspended, and in that case that they must be heard there in the first instance, and judgment given, does not remove the matter beyond the authority of the court; the effect of the provision is simply that while the order remains in force the exceptions can only be heard and judgment given at general term. (*Id.*)
16. It is only exceptions which can be sent, in the first instance, to the general term. The right of the defeated party to be heard on motion for a new trial, on a case at special term, given by said section, cannot be taken from him by an order of the judge at the trial. (*Id.*)
17. To authorize an order under section 297 of the Code, directing the application of property to the payment of a judgment, the property must belong to the judgment debtor. If another party claim an adverse interest in it, the question must be determined by an action (§ 299). (*Barnard* agt. *Kobbe*, 54 N. Y. R., 516.)
18. A court having jurisdiction to set aside the judgment has the right to give any less relief by which justice may be obtained, and by which the rights of a party in

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excusable default may be protected, and the mode of effecting this object is under the control and subject to the discretion of the court. (*McCall* agt. *McCall*, 54 N. Y. R., 541.)

N.

NATIONAL BANKS.

1. A national bank can properly and legally engage in the business of dealing in and exchanging government securities. (*Van Leuven* agt. *First National Bank*, 54 N. Y. R., 671.)

NEGLIGENCE.

1. Where a railroad corporation lets the contract for building its entire road to a contractor for an agreed price, and the contractor sublets a portion of his contract to a sub-contractor, and during the progress of the work, through carelessness of the workmen in blasting rock, an injury is done the plaintiff, the railroad corporation is not liable therefor. (*McCafferty* agt. *Spuyten Duyvil, &c.*, R. R. Co., ante, 44.)
2. Where the work in progress is lawful, and not a nuisance, the principal is not liable for the acts or negligence of another, unless the relation of master and servant or principal and agent exists between them. (*Id.*)
3. Whether the plaintiff was guilty of contributory negligence in standing in front of a circular saw in motion are questions of fact for the jury upon the facts stated. (*Ackart* agt. *Lansing*, ante, 374.)
4. It is the duty of saw-mill owners so to provide it with customary or available machinery and appliances as that it should be reasonably free from a likelihood to accident. (*Id.*)

5. The plaintiff was not bound to give his instructions to the principal, and it was not a voluntary or needless act to pass by the principal and enter the mill to give instructions to the practical agent. (*Id.*)

See RAILROADS.

Banlec agt. *N. Y. & Harlem R. R. Co.*, ante, 399.

NEWLY DISCOVERED EVIDENCE.

1. In this case, a motion for a new trial, on the ground of newly discovered evidence, was denied, for the reason that the evidence so discovered did not fulfill the requirements of the rule applicable in such cases, viz., that it should be so decisive in character, as that, to a reasonable certainty, it would be productive on another trial of an opposite result. (*Darbee* agt. *Elwood*, 2 Hun, 599.)

NEW TRIAL.

1. The affidavits used on a motion for a new trial, on the ground of newly discovered evidence, must show the existence of other evidence, not available by the use of reasonable diligence on the trial already had, which, if then given, would probably have produced a more favorable result to the applicant. A failure in either respect will not only justify, but require, a denial of the application. Where, on a motion for a new trial, an affidavit was produced, made by a person who had given material evidence in the plaintiff's favor on the trial, which stated in substance that the witness had committed perjury in testifying as he did; held, that the court properly declined to set aside the verdict on account of it. The affidavit of such a person is not entitled to so much weight as to justify the con-

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clusion that the evidence given by him, and which the jury may have regarded as credible and truthful, was corruptly and willfully false. (*People* agt. *McGuire*, 2 *Hun*, 269.)

2. Where a new trial is asked, as a matter of favor, or rests in the discretion of the court, a condition may be imposed upon granting it; but where a party asks it as a matter of right, because some legal error was committed, this court has no discretion to grant or withhold it; but, finding error, is bound to reverse the judgment and grant a new trial, and cannot impose a condition thereon. (*Anderson* agt. *R. W. & O. R. R. Co.*, 54 *N. Y. R.*, 384.)

3. An order denying a motion for a new trial, on the ground of surprise and newly discovered evidence, is not reviewable in this court. (*Dalrymple* agt. *Hannum*, 54 *N. Y. R.*, 654.)

NEW YORK CITY.

1. A foot passenger has no priority of right over vehicles in the streets of the city of New York. (*Belton* agt. *Baxter*, 54 *N. Y. R.*, 245.)

NOTICE OF APPEAL.

1. Where a notice of appeal from a justice's judgment indicates that the defendant in the judgment appeals to the county court, giving the ground upon which such appeal is founded, and the notice is signed by the appellant or his attorney, either at the end or upon the back thereof, it is sufficient. (*Burrows* agt. *Norton*, 2 *Hun*, 550.)

NOTICE OF SALE.

1. A notice of sale, addressed to a party interested in mortgaged

premises as administratrix, is sufficient, though the word administratrix is not added to her name. (*George* agt. *Arthur*, 2 *Hun*, 406.)

NOTICE OF SUIT PENDING.

1. The right of filing a notice of *lis pendens* in all actions affecting the title to real property is an absolute one (*Code*, § 132), not depending on the discretion of the court; when once filed in a proper action, the court cannot order it canceled so long as the action is pending and undetermined. (*Mills* agt. *Bliss*, 55 *N. Y. R.*, 189.)

NOTICE OF TRIAL.

1. Upon the trial of an action before a referee, a defendant is entitled to fourteen days' notice of trial, and a judgment entered without such notice, unless the same has been waived, is irregular, and will be set aside. (*Mohrmann* agt. *Bush*, 2 *Hun*, 874.)

O.

OFFICE AND OFFICER.

1. A ministerial officer, charged by statute with an absolute and certain duty, in the performance of which an individual has a special interest, is liable to an action if he refuses to perform it, and he is not relieved from the consequences of his disobedience, because it is prompted by an honest belief upon his part that the statute is unconstitutional. (*Clark* agt. *Miller*, 54 *N. Y. R.*, 528.)
2. The refusal of an officer or trustee to perform the duties of his office, while it may be ground of removal, does not, of itself, create a vacancy. (*Connis* agt. *R. P. D. Church*, 54 *N. Y. R.*, 561.)

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3. Public officers, charged with *quasi* public trusts, in the discharge of which private persons are interested, under laws creating the obligations of contracts, are not answerable for the misconduct of their predecessors. If any former officer has been guilty of a breach of such a trust, he is responsible; his successor is not. Each is answerable in his own time for his own discharge of duty. (*Vose* agt. *Reed*, 54 N. Y. R., 657.)

ORDER.

1. An order was granted by a justice of the supreme court at chambers, in the first district, appointing a receiver of the property, franchise and effects of the defendant. It did not appear that the order had ever been entered in the second department. *Held*, that, being a chamber order, no appeal from it would lie until it had been so entered. The jurisdiction of the general term in each department, on appeals from such orders, is, by the act of 1870 (*chap.* 408, § 10), confined to orders which have been entered in the department. (*Clinch* agt. *South Side R. R. Co.*, 2 Hun, 154.)

ORDER OF ARREST.

1. The alleged fraud was practiced in New Jersey; the entire transaction happened there; the parties lived there; the plaintiff pursued his claim to judgment in the courts of that state, without any averment of fraud against the defendant; and the judgment which he there obtained now constitutes the debt or obligation on which this action is brought. Whether, under such circumstances, an order of arrest can be granted, *quere*. (*Goodale* agt. *Finn*, 2 Hun, 151.)
2. Within twenty days after the entry of judgment in this action,

an order was made, denying defendant's motion to vacate an order of arrest granted therein, but allowing defendant to renew the motion. After the expiration of the twenty days, the defendant renewed the motion, which was denied. *Held*, that the first order did not operate to extend the time to apply to vacate the order of arrest, and that the second application, being made after the expiration of the time prescribed by the Code, was properly denied. (*Wheeler* agt. *Brady*, 2 Hun, 347.)

P.

PARENT AND CHILD.

1. It is not the policy of the law to award damages where there has been any relaxation of parental duties and obligations toward a feeble or unprotected child, that may tend to encourage or induce neglect—still less when a parent by a direct act, exposes a child at a helpless or tender age to suffer injury, does the law favor the recovery of damages for an injury thus caused. (*McLain* agt. *Van Zandt*, *ante*, 80.)

PARTIES.

1. The non-joinder of a person jointly liable with a defendant in an action may be set up in an answer, and is, if established when so set up, a perfect defense to such action. (*Mason* agt. *Wells*, 2 Hun, 518.)
2. This action was brought by the plaintiff, the lessee of a store, to recover damages for injuries to his goods, occasioned by the heat from a steam boiler, placed in the basement of the building by the defendant, his lessor. Upon the trial, it appeared that the plaintiff had a partner, and that the prop-

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erty injured belonged to the firm. The court dismissed the complaint on the ground of the non-joinder of the partner. *Held*, that this was error. When the defense of non-joinder of parties plaintiff exists, and is not disclosed by the complaint, it must be set up in the answer. (*Dickinson* agt. *Vanderpoel*, 2 *Hun*, 626.)

3. After a judgment in favor of plaintiff in an action which survives as against the representatives of a deceased defendant, though such representatives could not be properly joined as co-defendants with the other parties defendant, the proper practice is to move for a severance of the action. In such case, if the representatives come voluntarily into court and ask to be made parties defendant, and obtain judgment in their favor, directing a new trial, the court will not, on their application, vacate the order of substitution which they obtained. (*Arthur* agt. *Grinwald*, 2 *Hun*, 606.)

PARTITION.

1. Commissioners appointed to make partition of real estate are not entitled to more than two dollars per day for each day *actually* and *necessarily* employed in the business of such partition, besides their actual and necessary disbursements, even where they are also directed to sell a portion of the property. (*Campbell* agt. *Campbell*, *ante*, 255.)
2. Each commissioner is entitled to compensation at that rate only for the time he was actually and necessarily employed in the duties of his office. The affidavits used on a motion to adjust the fees and expenses of commissioners must show, in detail, the number of days' service actually and necessarily performed by each commissioner, and, also, the actual disbursements made by the commis-

sioners, together with the necessity of incurring them. (*Id.*)

3. The provisions of section 135 of the Code, authorizing service of summons by publication, and of section 175, authorizing the designation of a defendant by a fictitious name, when his real name is not known, are not applicable to "unknown owners" in suits for partition; they are to be brought in by the publication of notice substantially in the form and in the manner prescribed by the provisions of the Revised Statutes (2 *R. S.*, 186, § 124, as amended by chap. 277, *Laws of 1842*), which are made applicable to partition suits (§ 4, chap. 277, *Laws of 1842*; *Code*, § 448). (*Sanford* agt. *White*, 56 *N. Y. R.*, 359.)
4. The publication of a summons in the ordinary form is not a substantial compliance with said provisions, as they require the published notice, to specify the nature of the action, whether in partition or not, and this is substantial. (*Id.*)
5. Accordingly, *held*, where in an action for partition there were unknown owners who were attempted to be brought in by the publication of the summons only, that a purchaser, under a decree therein, was not bound to complete his purchase, because of defect of title. (*Id.*)

PASSENGERS.

1. A railroad company has a right to provide and insist that its passenger tickets shall be used upon the day when issued; also, that every passenger, when entering a train, shall pay his fare or produce a ticket showing his right to ride upon that train, and in enforcing such regulations neither it nor its employes are liable. (*Elmore* agt. *Sands*, 54 *N. Y. R.*, 512.)

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2. Whether a ticket is to be regarded as evidencing a contract, or as a token or voucher of the payment of fare only, the effect is the same. If the latter, it is the duty of the passenger, who desires not to pay upon the cars, to see that he has a proper voucher. (*Id.*)
5. A bill *quia timet* is a measure of precautionary justice; and a complaint to make out a case, in the nature of such a bill, must state facts showing wrongs or anticipated mischiefs which should be forestalled and prevented. (*Id.*)

PLEADING.

1. Matter of law is not matter to be alleged in pleadings, and no issue can be framed upon an allegation as to the law. Facts only are pleadable, and upon them, without allegations, the courts pronounce and apply the law. (*People ex rel. agt. Commissioners*, 54 N. Y. R., 276.)
2. An objection to the ability of the plaintiff to bring suit in the form adopted is in the nature of a dilatory plea, and to be available must be strictly pleaded. (*Wright agt. Wright*, 54 N. Y. R., 437.)
3. Under a complaint to recover an alleged agreed compensation for services, a recovery upon proof of and for the value of the services is sustainable. At most, it is but a variance between the pleadings and proof, which may be disregarded, unless it appear that it misled the defendant. (*Sussdorf agt. Schmidt*, 55 N. Y. R., 319.)
4. The only change wrought by the Code (§ 449), in proceedings to determine claims to real property, is that now they may be prosecuted by action. Such action must be in pursuance of the provisions of the Revised Statutes. The complaint must allege that defendants unjustly claim title to the premises. It must also, in its prayer for judgment or otherwise, notify defendants that unless they appear and assert their claim they will be forever barred. (*Bailey agt. Briggs*, 56 N. Y. R., 407.)

6. A complaint cannot be sustained as a bill of peace where neither a great number of persons are interested in the questions in dispute, nor is the action necessary to prevent a multiplicity of actions; nor where, although the relative rights of the parties have not been adjudicated upon, yet they rest entirely upon the legal construction of a written instrument, to which both parties look as the source of their rights, and the true meaning and intention of which can be readily pronounced by a court of law, when the parties shall appear before it with an actual controversy. (*Id.*)

POSSESSION.

1. Possession of personal property is presumptive evidence of ownership; and this rule applies to all personal property, and to negotiable paper. Railroad bonds are negotiable, and will pass by delivery. (*Wickes agt. Adirondack Co.*, 2 Hun, 112.)

PRACTICE.

1. Where exceptions are taken to a referee's findings of fact and a case is made for the purpose of reviewing them, it must be assumed that all the evidence in support of the findings excepted to is inserted in the case. If the party making up the case omits any such evidence, it is the duty of the other party, if he deem the evidence material to sustain the findings, to cause it to be inserted by amendment. (*Perkins agt. Hill*, 56 N. Y. R., 87.)

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PRECEPT.

1. Where on the settlement of the accounts of a receiver, an order of the court is issued directing the amount found to be due from him to be paid over on demand to the proper party, together with a specified sum in addition as referee's fees; and where a personal demand has been made of the receiver, under the order of the court, for payment of these sums, which has been refused, it is no objection to the validity of the order of the court on issuing the precept for commitment, or to the process, that it was issued for a less amount (by deducting the referee's fees) than was demanded. (*O'Mahoney agt. Belmont, ante, 29.*)

PRINCIPAL AND AGENT.

1. Public policy, when it should be considered as the policy of the law, forbids an agent, by any underhand arrangement or device, from becoming the owner of his principal's property employed in or about the agency. (*Holloway agt. Stevens, ante, 129.*)
2. Where an arrangement was made and carried into effect, without the knowledge of the principal, that the principal's property should be sold upon the execution issued in favor of the defendant and purchased by the agent, and the proceeds, after payment of the sheriff's fees, which were fixed at the exorbitant sum of \$200, paid over to the defendant, and that no restitution of it should be made in case of a reversal of the judgment. (*Id.*)
3. *Held*, that the principal could not be deprived of the right secured to him by the law of having the proceeds of his property sold under the execution restored to him on the reversal of the judgment upon which the execution issued. (*Id.*)

PRIVILEGED COMMUNICATIONS.

1. Communications between attorney and client, in reference to all matters which are the proper subject of professional employment, are privileged. (*Fales agt. Omssted, 56 N. Y. R., 682.*)

PUBLIC OFFICERS.

1. It is against public policy and unlawful to allow the assignment or transfer of the salary of a public officer before it becomes due and payable. (*Bliss agt. Lawrence, ante, 21.*)
2. Salaries are by law payable after work is performed and not before; and while this remains the law, it must be presumed to be a wise regulation and necessary in the view of the law makers to the efficiency of the public service. (*Id.*)
3. The substance of this whole doctrine is, the necessity of maintaining the efficiency of the public service, by seeing to it that public salaries really go to those who perform the public service. To this extent the public policy of every country must go to form the end in view. (*Id.*)

See JANITOR.

Sullivan agt. Mayor, etc., N. Y., ante, 238.

Q.

QUESTIONS OF LAW AND FACT.

1. Where the intent of a testator is to be ascertained from the language of his will alone, or from the language and surrounding circumstances about which there is no dispute, a question of law for the

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determination of the court alone is presented. (*Underhill* agt. *Vandervoort*, 56 N. Y. R., 242.)

2. While it cannot be held as matter of law, where an injury is received by a passenger upon a railroad in attempting to alight from a car while it is in motion, that this act under all circumstances constitutes contributory negligence, it is not in every case a question of fact for a jury. When the facts are undisputed, the question of contributory negligence may become one of law. (*Morrison* agt. *E. R. Co.*, 56 N. Y. R., 802.)

3. Possession of stolen property recently after the larceny does not in the absence of any explanation create a presumption of law of the guilt of the possessor, but simply one of fact, to be passed upon and determined by the jury. (*Stover* agt. *Peoples*, 56 N. Y. R., 815.)

4. The refusal of a trial court to direct a verdict or to nonsuit is not error of law where, although the evidence be uncontradictory, conflicting inferences may be drawn therefrom; or where conflicting constructions or meanings may fairly be given to the language employed, the facts, not simply the evidence, must be undisputed to make the question one of law. (*Smith* agt. *Coe*, 55 N. Y. R., 678.)

R.

RAILROADS.

1. Where a railroad corporation lets the contract for building its entire road to a contractor for an agreed price, and the contractor sublets a portion of his contract to a subcontractor, and during the progress of the work, through carelessness of the workmen in blasting rock, an injury is done the plaintiff, the railroad corporation is not liable therefor. (*McCafferty* agt.

Spryten Dwyer, &c., R. R. Co., ante, 44.)

2. Where the work in progress is lawful, and not a nuisance, the principal is not liable for the acts or negligence of another, unless the relation of master and servant or principal and agent exists between them. (*Id.*)

3. It is now an established and well settled doctrine that if a master is wanting in proper care in the selection of servants, and negligently or knowingly employs or retains in his service those who are incompetent and unfit for the duties to which they are assigned, he is liable to respond to other employees and servants engaged in the same service, who may sustain damages by reason of such incompetence and unfitness. (*Banlec* agt. *N. Y. & Harlem R. R. Co.*, ante, 399.)

4. It is likewise settled that when the master is a corporation, necessarily acting by and through agents, the acts of its general agents, charged with the employment and discharge of servants in the performance of that duty, must be regarded as its acts. (*Id.*)

5. And it is also well settled that when reasonable precautions and efforts to procure safe and skillful servants are used, and without fault one is employed through whose incompetency damage occurs to a fellow-servant, the master is not liable. (*Id.*)

6. When, as in this case, the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence, with proof that the principal had knowledge of such acts. (*Id.*)

7. But proof of specific acts of negligence of a servant or agent on one or more occasions, does not tend

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- to prove negligence on the particular occasion which is the subject of inquiry. (*Id.*)
8. It is the duty of a railroad corporation to exercise due, that is, ordinary care, in the selection and employment of its servants and agents, having respect to their particular duties and responsibilities and the consequence that may result from the want of competence, skill or care in the performance of their duties. (*Id.*)
 9. An individual who, by years of faithful service as an employe, has shown himself trustworthy, vigilant and competent, is not disqualified for further employment, and proved either incompetent or careless, and not trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. (*Id.*)
 10. The verdict of a jury against a railroad corporation for negligence, based upon insufficient evidence, would be against evidence, and in such case it is the duty of the court to nonsuit. (*Id.*)
 8. It is the duty of a referee, if requested so to do, to pass one way or the other upon every question of fact involved in the determination of a material issue, whether the evidence be conflicting or uncontradicted, and a refusal so to do is error which may be reached and corrected by application to the court to send the case back to the referee for specific findings upon such questions. (*Meacham* agt. *Burke*, 54 N. Y. R., 217.)
 4. As a foundation for such application, it is the duty of the party to request the referee specifically to find such facts and conclusions as shall, upon the evidence, be regarded as material to the issue. (*Id.*)
 5. Should the application be denied, the materiality of the findings asked for can be determined at general term or in the court of appeals, on appeal from the judgment. (*Id.*)
 6. If a referee finds a fact wholly unsupported by evidence, or refuses to find a fact which the uncontradicted evidence establishes, it raises a simple question of law, which may be dealt with in the ordinary form in the court of last resort. (*Id.*)

REFEREE.

1. A referee appointed to take and report the evidence in a cause, has no power to pass upon objections to evidence, and where objections taken before him are not renewed, and rulings had thereon, upon the trial before the court, they are not available upon appeal. (*Fox* agt. *Moyer*, 54 N. Y. R., 125.)
2. A referee has power to dismiss the plaintiff's complaint on his failure to appear, or, after his appearance, on his failure to proceed with the trial, or after having given testimony, on his refusal to proceed and close his case. (*Morange* agt. *Meigs*, 54 N. Y. R., 207.)

REFERENCE.

1. In all cases arising on contract it must appear that the trial will require an examination of a long account in order to refer the action. The mere affidavit of the moving party that it will be not conclusive. The pleadings should also show this fact. (*Lord* agt. *Connor*, ante, 95.)
2. Where an answer sets up a counter-claim and claims damages by way of recoupment, it does not change the character of the action in the complaint founded on contract, nor render the action non-

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- referable. (*Williams* agt. *Allen*, ante, 357.)
3. One item of account made up of a large number of small charges which would require to be proved on the trial is sufficient ground of reference. (*Id.*)
 4. Where on a trial before a referee, where considerable evidence has been given on questions of fact, the referee reports: "I find that the plaintiffs have failed to establish the facts necessary to sustain the complaint. I do therefore find that the defendant is entitled to a judgment dismissing the complaint, with costs," the report is nothing more in substance than a general conclusion that the complaint should be dismissed. (*Gore* agt. *Hammond*, ante, 385.)
 5. The right secured to a party by statute, to have separate findings of fact and conclusions of law inserted by the referee in his report is substantial. (*Id.*)
 6. The proper remedy in such a case is not by motion to set aside the report, but the aggrieved party should move to send the case back to the referee to pass specifically upon the material questions of fact and law which he has failed to pass upon, or to resettle his report. (*Id.*)
 7. And on such application, it is necessary for the moving party to show to the court what findings he desires to have inserted in the report, and that such findings are material and necessary to a proper review of the judgment. The order sending the case back to the referee must instruct him as to the questions on which he is required to add findings. (*Id.*)
 8. It is also incumbent on the moving party to show to the court that he requested the referee at the trial, or before the submission of the cause to him, to specifically find such facts and conclusions of law as he seeks by his motion to have inserted in the report. (*Id.*)
 9. Where the judgment in a mortgage foreclosure case directs a sale, and the payment by the referee, out of the proceeds, of any liens for taxes or assessments upon the premises existing at the time of the sale, the customary article included in such cases in the terms of sale, imposing upon the purchaser the burden of producing to the referee proof of such liens and vouchers for the payment thereof, is a reasonable and proper one, and excuses the referee from the duty of making examination for the existence and amount of the liens, and from responsibility for accuracy therein; but it does not excuse a disregard of the judgment; and a referee, having knowledge that there were liens existing at the time of the sale, is not authorized in paying over the purchase-money as if there were none, although the purchaser fail to produce the proof and vouchers of payment. (*Easton* agt. *Pickersgill*, 55 N. Y. R., 310.)
 10. The remedy of the referee, in such case, is by application to the court for directions. (*Id.*)
 11. An order requiring the referee, appointed to sell by a judgment in a foreclosure case, to convey by "a valid and sufficient deed," requires a deed sufficient in form and terms to make the title obtained by it as valid to the purchaser as it is in the power of the referee officially to make it. (*Id.*)
 12. Where in an action in which no answer is interposed it is necessary to take and state an account for the information of the court before judgment, and a reference is ordered for that purpose, the report of the referee has the effect of a special verdict (*Code*, § 272); and where exceptions are filed to the report by defendant, which are

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- overruled, the report confirmed and judgment rendered, an appeal from the judgment brings up the question whether the facts reported are sufficient to sustain the judgment, and upon a case with exceptions joined with the report, errors of law on the part of the referee may be reviewed. (*Darling* agt. *Brewster*, 55 N. Y. R., 667.)
13. When an oral agreement is made in open court upon trial before a referee, upon final submission, extending indefinitely the time within which the report may be made and delivered, the reference cannot be terminated in the manner provided by section 273 of the Code. (*Ballou* agt. *Parsons*, 55 N. Y. R., 673.)
14. It seems that, in such case, the proper practice, in order to terminate the extension, is to serve notice upon the opposite party and the referee; that unless the report is made within a specified reasonable time, the reference will be deemed ended. (*Id.*)
15. Upon taxation of costs, in an action tried by a referee, the clerk has nothing to do with the question whether the referee's report has been regularly obtained. His decision awarding judgment stands before the clerk as the mandate of the court, and, until vacated or set aside, on proper application to the court, its direction must be obeyed. (*Id.*)
16. The character of an action must be determined by the complaint, and if that is upon contract, the action is referable, although the answer sets up a counter-claim, and claims damages by way of recoupment. (*Williams* agt. *Allen*, 2 Hun, 377.)
17. If a party neglect to except to a referee's report, for eight days after notice of its filing, it becomes absolute, under Rule 39, although it is defective on its face. (*Catlin* agt. *Catlin*, 2 Hun, 378.)
18. Where, in an action upon an attorney's bill, the defenses interposed are, that the services are not worth the sum named; that the defendant did not make a contract to pay a sum certain; and payment; though it may, in many instances, be proper to refer the case to an attorney, yet, in some cases, it may be improper to compel the defendant to submit his defense to such a tribunal. (*Flanders* agt. *Odell*, 2 Hun, 664.)

REFORMATION OF CONTRACT.

1. In order to justify the reformation of a policy of insurance the evidence must show a mistake to have been made by both parties, and that the instrument is not such as it was intended to be when issued and received. (*McHugh* agt. *Imperial Fire Ins. Co.*, ante, 230.)
2. A mistake on one side may be ground for rescinding a contract or for a refusal specifically to enforce its terms, but not for its alteration, and the imposition upon the other party of obligations and liabilities which he never intended to assume. (*Id.*)

REMEDIES.

1. Under the Code the legal rights of an owner of land may be established, and the equitable remedy, by injunction restraining interference therewith, obtained in the same action. (*Broistedt* agt. *S. S. R. R. Co.*, 55 N. Y. R., 220.)
2. The rule existing prior to the Code, that where, in an action for specific performance, it appears that plaintiff was aware before the commencement thereof that defendant could not perform, equity would not retain the suit for the purpose of awarding damages, is

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abrogated by the Code; that authorizes the uniting of causes of action, both legal and equitable, arising out of the same transaction (§ 167). (*Sternberger* agt. *McGovern*, 56 *N. Y. R.*, 12.)

3. Where, therefore, the complaint states facts giving a cause of action for specific performance of a contract; also, one for damages for breach of the contract, plaintiff is entitled to have both tried if necessary to obtain his rights, and a failure to show a right to the equitable relief sought does not defeat his right to the legal remedy. (*Id.*)

4. An order of arrest and a writ of attachment are not so inconsistent in their nature that the allowance of both, in the same action, will render both void. (*R. v. R. I. & St. L. R. R. Co.* agt. *Boody*, 56 *N. Y. R.*, 456.)

5. Whether the party can, in the discretion of the court, be confined to one of these remedies, in a case falling alike under the description of cases wherein the two are respectively allowed, *quere*. (*Id.*)

REMOVAL OF CAUSES.

1. Where, under the provisions of the federal judiciary act of 1789 (§ 12, 1 *Stat. at Large*, 78), a defendant, resident of another state, files his petition for the removal of a cause from a state court to the circuit court of the United States, and presents a bond apparently in all respects ample, the state court cannot arbitrarily refuse to receive the bond, without giving the party an opportunity to correct the same in any respect in which it may be deemed insufficient. (*Taylor* agt. *Shew*, 54 *N. Y. R.*, 75.)

REPLEVIN.

1. A collector of taxes of the city of Buffalo, who shows that property

was taken under a warrant, has made out a complete defense to an action for the recovery of such property; and, if such property be taken from him in an action of claim and delivery of personal property, he is entitled to judgment for its redelivery to him, and damages for its detention, he having acquired a special property in it by force of the levy. The plaintiff cannot sustain such action, by showing that the tax, for the collection of which the warrant issued, was illegally imposed. (*Niagara Elevating Company* agt. *McNamara*, 3 *Hun*, 416.)

S.

SALARIES.

1. It is against public policy and unlawful to allow the assignment or transfer of the salary of a public officer before it becomes due and payable. (*Bliss* agt. *Lawrence*, *ante*, 21.)
2. Salaries are by law payable after work is performed and not before; and while this remains the law, it must be presumed to be a wise regulation and necessary in the view of the law makers to the efficiency of the public service. (*Id.*)
3. The substance of this whole doctrine is, the necessity of maintaining the efficiency of the public service by seeing to it that public salaries really go to those who perform the public service. To this extent the public policy of every country must go to form the end in view. (*Id.*)

SET-OFF.

1. *It seems* that the supreme court, in the exercise of its equitable powers, has authority in an action

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brought for that purpose to compel the set-off of a demand, not in judgment, against a judgment; and this, although the demand is a verdict in an action for a personal tort. (*Zogbaum agt. Parker*, 55 N. Y. R., 120.)

SERVICE.

1. The service of notice of appeal from the special to the general term of this court, made after the expiration of the time limited for appealing, cannot be sustained, although the respondent's attorney admits due service of notice of the appeal. (*Waring agt. Senior*, ante, 226.)
2. If the admission of the respondent's attorney could be considered as a waiver of the irregularity as to him, it could not affect the notice served on the clerk. (*Id.*)
3. Where the admission of personal service of the summons and complaint by the defendant is ante-dated, for the purpose of giving the plaintiff preference in the entry of judgment by default against the defendant, over another judgment creditor of the defendant, although the defendant might be estopped from questioning the date of the admission, not so with the subsequent judgment creditor, who is authorized to have the first judgment set aside on his motion as against his judgment. (*Trolan agt. Pagan*, ante, 240.)
4. The admission in this case did not state the place of service, so that upon the face of the papers there was no proof of service sufficient to authorize the entry of judgment. The Code says (§ 138), that "the admission must state the time and place of the service." (*Id.*)
5. Where service of papers is made by mail, no condition should be

reserved; the service must be absolute and complete at the deposit in the post-office. (*Gaffney agt. Bigelow*, ante, 475.)

6. Where the papers to be served, are inclosed in an envelope which has on its face a notice, "If not called for in five days return to the attorneys" making the deposit in the post-office, is such a condition or qualification as vitiates the service. (*Id.*)

SHERIFF.

1. Section 232 of the Code limits the right of the sheriff in discontinuing attachment suits brought by him, except "at such times and upon such terms as the court or judge may direct." (*O'Brien agt. Merchants' Ins. Co.*, ante, 18.)
2. The court will not allow any discontinuance of such actions on the part of the sheriff that will inure to the injury of the parties interested in the debts attached. (*Id.*)
3. An execution issued to a deputy sheriff, who is the judgment debtor in the execution, cannot be executed against himself. (*Holbrook agt. Brennan*, ante, 519.)
4. It would be absurd to hold that when the sheriff is forbidden by statute to execute process where he is a party, that he may authorize a deputy to execute process against himself; and this he does where he delivers an execution against the deputy to the deputy to execute against himself. (*Id.*)
5. And where in such case the deputy returns the execution *nulla bona* when it is made to appear that the deputy had property which might have been, during the life of the execution, applied on the execution, the sheriff will be held liable in an action for a false return. (*Id.*)

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SHERIFF'S SALE.

1. The court has the power to entertain a motion to set aside a sale by a sheriff of personal property under an execution. (*Morgan agt. Holladay, ante, 86.*)
2. Where the sale, as conducted by the sheriff, is in violation of the statute—First, that a large portion of the property was not present and within the view of those attending the sale; and, Second, it was not sold in lots and parcels—it will be set aside and the sheriff directed to restore the bid to the purchaser. (*Id.*)
3. Where a sheriff levies upon various articles of personal property belonging to a copartnership firm, or an individual member, he is bound to sell it in parcels. (*Tugwell agt. Bussing, ante, 89.*)

SLANDER.

1. "There was evidence from which the jury might infer that the slanderous words charged were heard only by the plaintiff; if so, there was no slander. The court below, therefore, erred in charging the jury that the mere speaking of the words rendered the defendant liable, and on this ground there must be a new trial granted." (*Hails agt. Fuller, 2 Hun, 519.*)

SPECIAL PROCEEDINGS.

1. A proceeding under the general railroad act (*chap. 140, Laws of 1850*), for the condemnation of land for railroad purposes is a special proceeding, but is analogous in its purpose and scope to an action; and services in resisting the application are similar to services in defending an action. (*In re R. & S. R. R. Co. agt. Davis, 55 N. Y. R., 145.*)

2. When, therefore, costs for contesting are allowed, under the "act in relation to special proceedings" (*chap. 270, Laws of 1854*), authorizing the allowance of costs in special proceedings, in the discretion of the court, and providing that, when allowed, they shall "be at the rate allowed for similar services in civil actions, the party is entitled to full costs upon hearing and upon appeal, as in an action, at the rates prescribed by the Code. (*Id.*)
3. The costs referred to, however, in said act, are simply those to which the party is of right entitled; no extra allowance can be made. The provision for extra allowance in section 309 of the Code applies to actions only, not to special proceedings. (*Id.*)

STAY OF PROCEEDINGS.

1. A stipulation to stay proceedings under a judgment until the appeal from the same should be determined is to be interpreted reasonably, and an order to set aside execution issued in violation of the terms of such stipulation should be affirmed. (*Murphy agt. Keyes, ante, 118.*)

STIPULATION.

1. Three actions were pending between the same parties, two in this court, and one in the superior court. The plaintiffs having recovered judgment in the superior court, it was stipulated by the parties to the actions, that the plaintiffs might enter judgments in the actions in this court; that the testimony, rulings and exceptions in the case in the superior court should apply to such actions; and that the actions in this court should abide the event of an appeal to be taken from the judgment in the superior court. *Held,*

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that the effect of this stipulation was to stay all proceedings in the actions in this court, during the appeal from the judgment in the superior court, and that executions issued on the judgments entered in this court were properly set aside. (*Murphy* agt. *Keyes*, 2 *Hun*, 375.)

STOCKHOLDERS.

1. Where the directors of a corporation declared two dividends, the one payable on the day the same was declared, and the other at the option of their agent. (*Hill* agt. *Newichawanick Co.*, ante, 427.)
2. *Held*, that although no day was definitely named for the payment of the second dividend, and no time fixed for closing or opening books, to determine who otherwise would be entitled; stockholders who were such on the day of the declaration of the dividend, are the persons who should receive it. (*Id.*)
3. The person to whom scrip for stock has been delivered, with a transfer thereof, and power of attorney to perfect the transfer, is the legal owner of the stock, although the same has not been actually transferred on the books of the corporation. (*Id.*)

STREETS.

See EASEMENT.

Grinnell agt. *Kirtland*, ante, 17.

SUBMISSION OF CONTROVERSY.

1. In case of the submission of a controversy without action under the Code (§ 372), the court is confined to the facts agreed upon, and can make no inferences, or in any way depart from or go beyond

the statement presented. (*Fearing* agt. *Irwin*, 55 *N. Y. R.*, 486.)

2. In a case so submitted, where the question was as to whether plaintiffs could convey a clear title to lands over which certain highways passed, which were claimed by plaintiffs to have been closed by law, it was admitted that if said highway shall have been closed by law, the title to the abutting half of each of them (the land in question) will revert to the estate of plaintiffs' testator. *Held*, that the admission, although involving questions of law, was, for all the purposes of the submission, to be taken as a statement of fact, and was controlling. (*Id.*)

SUBSCRIPTION.

1. A subscription for the purpose of building or repairing a church in the following form, to wit: "We, the undersigned, do hereby, for value received, promise to pay to the consistory of the Reformed Protestant Dutch Church, of the town of Rochester, the several sums set opposite our respective names, for the purpose of paying off the indebtedness of said church, on condition that the sum of \$5,000 be subscribed therefor," expresses a sufficient and valid consideration; and where the condition has been complied with, becomes a binding obligation at law upon each subscriber. (*Trustees of R. P. D. Church* agt. *Hardenbergh*, ante, 414.)

SUMMONS.

1. Where the admission of personal service of the summons and complaint by the defendant is antedated, for the purpose of giving the plaintiff preference in the entry of judgment by default against the defendant, over another judgment creditor of the

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defendant, although the defendant might be estopped from questioning the date of the admission, not so with the subsequent judgment creditor, who is authorized to have the first judgment set aside on his motion as against his judgment. (*Trolan* agt. *Fugan*, ante, 240.)

2. The admission in this case did not state the place of service, so that upon the face of the papers there was no proof of service sufficient to authorize the entry of judgment. The Code says (§ 138), that "the admission must state the time and place of the service." (*Id.*)

SUNDAY.

1. A contract for the sale of property made upon Sunday is not, for that reason, void. To bring a transaction within the provision of the statute relating to the observance of Sunday (1 R. S., 678, § 71), which declares that no person shall expose to sale any wares, &c., on Sunday, clear proof of its violation must be produced. A private sale of property, not "exposed to sale," is not within its prohibitions. (*Eberle* agt. *Mehrbach*, 55 N. Y. R., 682.)

SUPPLEMENTAL COMPLAINT.

1. A supplemental complaint must be consistent with, and in aid of, the case made by the original complaint. A new and substantive cause of action cannot be set up, by way of supplemental complaint, as a ground of recovery, more especially a cause of action to which the plaintiff was not entitled when he commenced the action. (*Tiffany* agt. *Bowerman*, 2 Hun, 643.)

SUPPLEMENTARY PROCEEDINGS.

1. To authorize an order under section 297 of the Code, directing the application of property to the payment of a judgment, the property must belong to the judgment debtor. If another party claim an adverse interest in it, the question must be determined by an action (§ 299). (*Barnard* agt. *Kobbe*, 54 N. Y. R., 516.)

T.

TITLE.

1. A grantor of land who has no longer any interest therein, cannot take proceedings to remove a cloud on the title. Nor does the fact that he has warranted the title justify him in bringing the suit. (*Phillips* agt. *The Mayor*, 2 Hun, 212.)
2. The legal title to mortgaged premises remains in the mortgagor, and his title is not affected by default in payment or by surrender of possession to, or the taking of possession by the mortgagee. (*Trimm* agt. *Marsh*, 54 N. Y. R., 599.)

TRIAL.

1. An issue of fact in an action for a divorce from a marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived or a reference be ordered by the consent of both parties. (*Diets* agt. *Diets*, ante, 114.)
2. Upon the trial before a jury of issues settled in an equity action, the complaint cannot be dismissed as to one or all of the defendants. A verdict upon all the issues as to all the parties must be rendered, and the cause afterward heard by

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- the court. (*Moore* agt. *Met. N. Bk.*, 55 *N. Y. R.*, 41.)
3. A party seeking to enforce the rule that facts, though proven, are not available unless pleaded, must take this ground at the trial, otherwise he cannot avail himself thereof on review. (*Voorhees* agt. *Burchard*, 55 *N. Y. R.*, 98.)
 4. Testimony otherwise competent taken upon commission is not to be rejected, because not responsive to the interrogatory. (*Fussin* agt. *Hubbard*, 55 *N. Y. R.*, 465.)
 5. Where a witness testifies positively to facts which may be within his personal knowledge and the opposite party makes no inquiries to ascertain whether they were so or not, the court must assume that the witness speaks from such knowledge. This rule applies as well where the testimony of the witness is taken upon commission as to an oral examination. (*Id.*)
 6. To obviate an erroneous instruction to the jury upon a material point, it must be withdrawn in such explicit terms as to preclude the inference that the jury might have been influenced by it. (*Chapman* agt. *E. R. Co.*, 55 *N. Y. R.*, 579.)
 7. It is not error for the court to refuse to charge that if the jury believe certain specified witnesses, they must find for the party in whose favor they testified. The facts, upon which the instruction is asked, should be hypothetically stated, leaving the jury to decide as to whether they were proved. (*Id.*)
 8. After a trial of an equity action by, and a submission thereof to, the court, it has power, while it remains in its hands under advisement, of its own motion, to direct certain issues therein to be passed upon by a jury, and an order to that effect is not reviewable by this court. (*Brinkley* agt. *Brinkley*, 55 *N. Y. R.*, 192.)
 9. This power is not restricted or affected by section 267 of the Code requiring the judge to make and file his decision within a specified time; this is necessarily with the implied qualification that no other disposition is made of the case. (*Id.*)
 10. The party holding the affirmative upon an issue of fact has the right upon trial to open and close the proof, and to reply, in summing up the case to the jury. (*Millerd* agt. *Thorn*, 56 *N. Y. R.*, 402.)
 11. This is a legal right not resting in the discretion of the court, and a denial thereof may be excepted to, and the ruling reviewed upon appeal from the judgment. (*Id.*)
 12. It is not error for a trial court to refuse to charge the jury upon an irrelevant point. (*Kissenger* agt. *N. Y. & H. R. R. Co.*, 56 *N. Y. R.*, 588.)
 13. The refusal of the court to repeat a charge is not error. (*Id.*)
 14. Where, after the trial of a cause had been commenced at the circuit, a jury impaneled, and a witness sworn and examined, the court ordered that the cause be referred to a referee to hear and determine, held, that such proceedings at the circuit did not constitute a trial of the action. (*Third Nat. Bank* agt. *McKinstry*, 2 *Hun*, 411.)
 15. A request, upon the whole case, to direct a verdict for the defendant is, in substance and effect, the same as a motion for a nonsuit. (*Appleby* agt. *A. F. Ins. Co.*, 54 *N. Y. R.*, 253.)
 16. It is error for a judge to submit a question to a jury where there is no evidence to authorize any finding thereon; and so it is proper to refuse to submit a question unsupported by evidence. (*Algar* agt. *Gardner*, 54 *N. Y. R.*, 360.)

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17. Upon a jury trial the court is not bound to submit to the jury, for their consideration, abstract propositions of law; and where the jury have been properly instructed upon every question material to the disposition of the case, the court may properly decline to entertain any further application from either party to give further instructions. (*Moody* agt. *Osgood*, 54 N. Y. R., 488.)

18. Where evidence is given upon the trial of an action pertinent to the issues therein, and which also presents another issue not made by the pleadings, the reception of such evidence, without objection, is not a waiver of an objection to the consideration of such other issue. (*Williams* agt. *M. & T. F. Ins. Co.*, 54 N. Y. R., 577.)

19. It is not necessary to specify the ground upon which a motion for a nonsuit is denied. If a good ground exists, which has not been waived, it is sufficient. (*Id.*)

20. Where, upon a trial, after the close of plaintiff's evidence, a motion for a nonsuit is denied, and after defendant has entered upon his defense the court, upon its own motion, nonsuits the plaintiff, this is not of itself error. It is the duty of the court, believing it has committed an error upon the trial, to correct it at the earliest opportunity. (*Fitch* agt. *Hasler*, 54 N. Y. R., 677.)

TRUSTEE OF AN EXPRESS TRUST.

1. An agent of a mowing machine company, who contracts and sells mowing machines for the company, is a "trustee of an express trust," and may sue on the contract in his own name. (*Davis* agt. *Reynolds*, ante, 210.)

U.

UNDERTAKING.

1. On appeal from the general term of the marine court to this court, the undertaking required should be according to sections 854 and 856 of the Code. (*Holbrook* agt. *Brennan*, ante, 192.)

2. Where an undertaking with two sureties, who have justified in proper form, is presented to a justice of a district court in the city of New York, for the purpose of the removal of a proper case into the court of common pleas, the justice is bound judicially, to approve the undertaking and sign the order of removal. (*Connor* agt. *Moschowitz*, ante, 451.)

3. The justice has no discretion in such a case to refuse to approve and accept of one of the sureties on the ground that he is personally acquainted with him and will not accept him as a responsible surety. (*Id.*)

UNDERTAKING ON APPEAL.

1. Where an insufficient undertaking, given upon an appeal, has been accepted and received as proper and lawful, and the proceedings stayed by virtue of it, the principal is estopped from questioning its validity in an action brought against him by the sureties thereon. (*Bates* agt. *Merrick*, 2 Hun, 568.)

2. The undertaking was joint, and the complaint alleged that the amount was paid jointly. *Held*, that the plaintiffs were acting jointly in the execution of the undertaking; that they were jointly defrauded by the defendant, and were entitled to maintain a joint action. (*Id.*)

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V.

VENUE.

1. The provisions of chapter 239, Laws of 1873, providing for the removal of causes into the supreme court, and a change of the place of trial, are not affected by the unconstitutionality of that portion of the chapter which provides for the extension of the jurisdiction of the courts mentioned in it. (*Darragh* agt. *McKim*, 2 *Hun*, 337.)
2. A motion to change the place of trial, for any reason, must be made with reasonable diligence after issue has been joined in the action. (*Id.*)

VERDICT.

1. Where a paper, not in evidence on the trial, is clandestinely put into the books of account after the close of the testimony, containing criticisms and suggestions in reference to the accounts, which are the subject of litigation, the account books being submitted to the jury in their deliberations, it is sufficient to set aside the verdict without reference to the source or motive of such interference. (*O'Brien* agt. *Merchants' Ins. Co.*, ante, 448.)
2. "The object of the appellant in bringing this appeal would seem to be to procure the review of the action of the jury, notwithstanding the evidence is conflicting. If any question of practice should be deemed settled in this state, it is that such a review cannot be had. It would relieve clients of expense, and the courts of very much labor, if counsel would conform to a rule so long and so uniformly acted upon by the courts." (*Hayes* agt. *Thompson*, 2 *Hun*, 518.)

W.

WAIVER.

See EVIDENCE.

Dean agt. *Albina Life Ins. Co.*, ante, 36.

1. A party who voluntarily appears at a place different from that at which notice was given that evidence would be taken, and does not object, waives his right to complain of it on appeal. (*Catlin* agt. *Catlin*, 2 *Hun*, 378.)

WARRANT.

1. The plaintiff was arrested as a lunatic, on a warrant issued by two of the police justices of the city of Albany, on a complaint, duly made, and the certificate of two reputable physicians of said city. The warrant described the plaintiff as "James Annis Williams, of Knox," and was directed to the overseer of the poor of the city of Albany, and to any policeman of said city, &c.; and one of the said justices, in writing, authorized Charles Gage, of the town of Knox, to execute the warrant. In an action brought by the plaintiff to recover damages of the defendants who had arrested him in pursuance of said warrant, held, that every intendment was in favor of the jurisdiction of the magistrate, and that, from the fact that the warrant was issued in the city of Albany, by magistrates who resided there, it was to be presumed that the lunatic was there at the time the warrant was issued. The statement in it that the lunatic was of the town of Knox was a mere description of the person, and did not contradict the fact that he was in Albany when the warrant was issued. (*Williams* agt. *Williams*, 2 *Hun*, 111.)

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WILL.

1. The wife of an heir at law upon petition showing that herself and husband had not lived together for a number of years; that ill feeling existed between them; that she gave him no cause for separation or desertion from her, and that her husband had not personally attended for the purpose of contesting the probate of his deceased father's will, who had recently died leaving a large estate; that there were good grounds of such contest, and asked permission, in her own behalf separately to oppose the admission of the will in order to protect her *inchoate right of dower*. (*Matter of Rollwagen, ante, 103.*)
2. *Held*, that no case could be found, at least none reported, in which a wife's inchoate right of dower was determined as the sole ground of her right to apply for probate of a will under which her husband was a devisee or as the sole ground for permitting a contest of a will by her alone, in order to establish intestacy in case of no opposition to probate from her husband. (*Id.*)
3. In this case, however, the husband with other sons of the deceased appeared by counsel and made a vigorous contest to the probate of the will. (*Id.*)
4. Where, by the provisions of the will, after the devise of a few legacies, the whole income of the estate, both real and personal, is devised to the widow during her life, and who has collected the income of the estate and managed the same, she being also an executrix under the will, an heir at law, who refused to come in and accept the terms of settlement of the estate made with the widow and all the other children, cannot have an injunction to enjoin the executors from paying over any of the rents, profits or other periodical income to the widow until certain taxes and assessments on the estate shall have been paid and certain tax sales redeemed, &c. (*Clark agt. Coles, ante, 266.*)
5. 1st. Because the executors and executrix, whilst authorized by the will to "lease, sell, convey and dispose" of all or any part of the real estate of the testator, are not required so to do, and in fact have not exercised the power, but the income has been appropriated by the widow in her individual and not official capacity. (*Id.*)
6. 2d. Neither by the will is there any trust estate created in the defendants as executors and executrix, nor has there been any such power in fact exercised or claimed, and the issue of an injunction as asked would assume the contrary. (*Id.*)
7. Frederick Rollwagen, the testator, died in the city of New York on 11th of October, 1873, at the age of sixty-six years, leaving, as next of kin and heirs at law, three adult sons, seven grandchildren, the family of a deceased daughter; also left a widow (his third wife), who had a child born about one month after his death. The other heirs were children by the first marriage. He also left, at the time of his death, real and personal property worth about \$800,000, mostly in real estate. (*Matter of Rollwagen, ante, 289.*)
8. The application for the probate of the will, which was dated the 17th of June, 1873, and the codicil, which was dated on the 5th of September, 1873, was made and supported by the widow, named as executrix, and her two brothers, Henry and George Herrmann, named as two of his executors. Frederick Rollwagen, Jr., the testator's eldest son, was also named as one of the executors, but did not join in the application for probate, but joined with his

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- brothers in contesting both the will and codicil. (*Id.*)
9. The will and codicil gave to the widow a much larger proportion of the estate than would have been her share had the decedent died intestate. (*Id.*)
10. In this proceeding the surrogate examined sixty-eight witnesses, whose testimony covered over 1800 printed pages, and, as a final result, came to the conclusion : (*Id.*)
11. 1st. That the requirements of the statute had not been observed in the execution of the papers offered for probate; (*Id.*)
12. 2d. That the decedent, at the time of the alleged execution, was not possessed of *testamentary capacity*; and (*Id.*)
13. 3d. That the execution was the result of *undue influence, fraud and circumvention* exercised over the mind of the decedent by his wife and her brother Henry Herrmann. (*Id.*)
14. The testator by his will and codicil provided, that the interest, rents, issues and profits of that portion of his estate which should be allotted to any one of his daughters, as directed in the fifth article of his will, should by said trustees be applied to the sole and separate use of each daughter respectively, for whom the same should be holden in trust, and should be exempt from the control and debts of her husband; and on receiving a receipt or discharge of any *cestui que trust*, executed under her hand to them, acknowledging a sum applied to her use, said trustees should be absolved from any further obligations, in any way or manner, to pay the same sum. (*Bronson* agt. *Bronson*, ante, 481.)
15. The testator nowhere, either in his will or in the codicil, provided for or made any distribution of any accumulations, and one of the questions to be determined is, to whom the accumulations belong. (*Id.*)
16. *Held*, upon an examination of the will and codicil, that it was the intention of the testator, that the rents, issues and profits, of the portion allotted to any one of his daughters, should belong to her absolutely; and that all the income derived from the plaintiff's portion of her father's estate, and which has been allowed to accumulate in the hands of the trustees, belongs to her, and she is entitled to claim the payment of the same to her by the trustees, upon presentation of a proper receipt therefor. (*Id.*)
17. Where there are two equally probable interpretations of the language of a will, that one is to be adopted which prefers the kin of the testator to strangers. (*Quinn* agt. *Hardenbrook*, 54 N. Y. R., 83.)
18. Where a devise is to one who does not take by purchase, and could not take by inheritance, and is of lands now owned by the testator, as against the heirs, the word "now" will be construed to refer to the date of the will, not to the time of the testator's death. (*Id.*)

WITNESS.

See EXAMINATION OF A PARTY.
Spratt agt. *Huntington*, ante, 97.

1. A witness was examined by commission, as to the times at which certain varieties of silk could have been obtained at a given price, and answered the question, stating what he knew on the subject. To the general interrogatory, "If you know any other matter or thing concerning the matters hereinbefore inquired about, declare the same as fully and minutely as if

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you had been particularly interrogated thereto," he proceeded to state what he thought in reference to the time when the contracts were made for the silk, and certain inferences or conclusions of his on the subject. *Held*, that the answer was properly excluded. (*Heineman* agt. *Heard*, 2 *Hun*, 324.)

2. In the examination of witnesses, parties have the right to show whatever may fortify their statements, by indicating the improbability of mistake in making them. (*People* agt. *McGuire*, 2 *Hun*, 269.)

3. To impeach a witness, by showing that he has made some statement inconsistent with the contents of a document signed by him, the original document must be produced. (*Pratt* agt. *Norton*, 2 *Hun*, 517.)

WRIT OF ERROR.

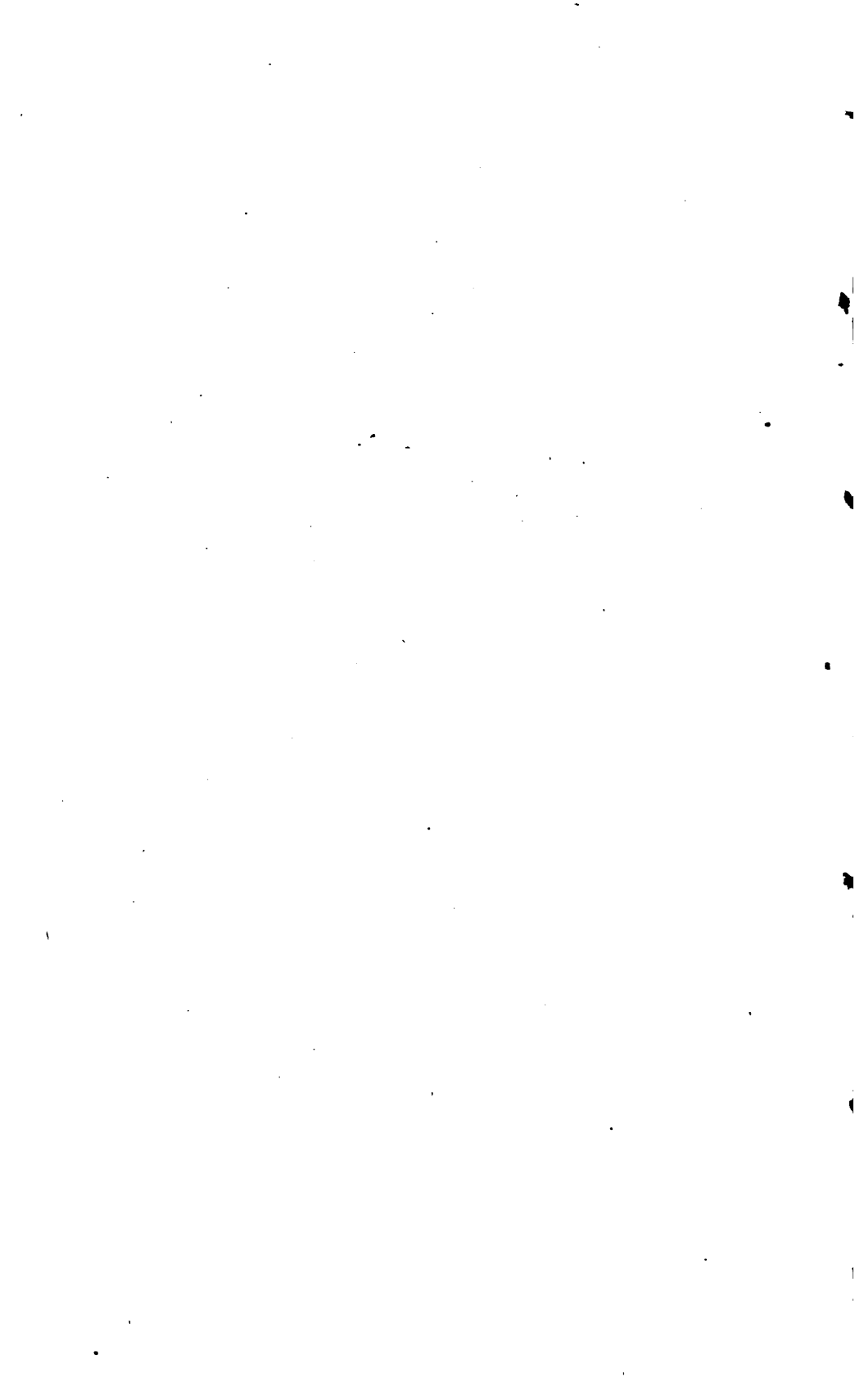
1. Where the question put to a witness is a proper one, and no objec-

tion made as to the answer, it not tending to connect the plaintiff in error with the offense charged, the writ cannot be sustained. (*McGuire* agt. *People*, *ante*, 517.)

2. Where the cross-examination of a witness upon one subject has been unreasonably protracted, and a question is put which has no bearing upon the issue or upon the credit of the witness, the cross-examination may be closed, in the sound discretion of the court. (*Id.*)

WRIT OF POSSESSION.

1. In the execution of a writ of possession after the return day, it will be presumed that the sheriff began the execution of the process within the lifetime of the writ. Writs of possession and executions for the sale of real estate are analogous, and both may be fully executed after the return day therein named. (*Wilbeck* agt. *Van Rensselaer*, 2 *Hun*, 55.)



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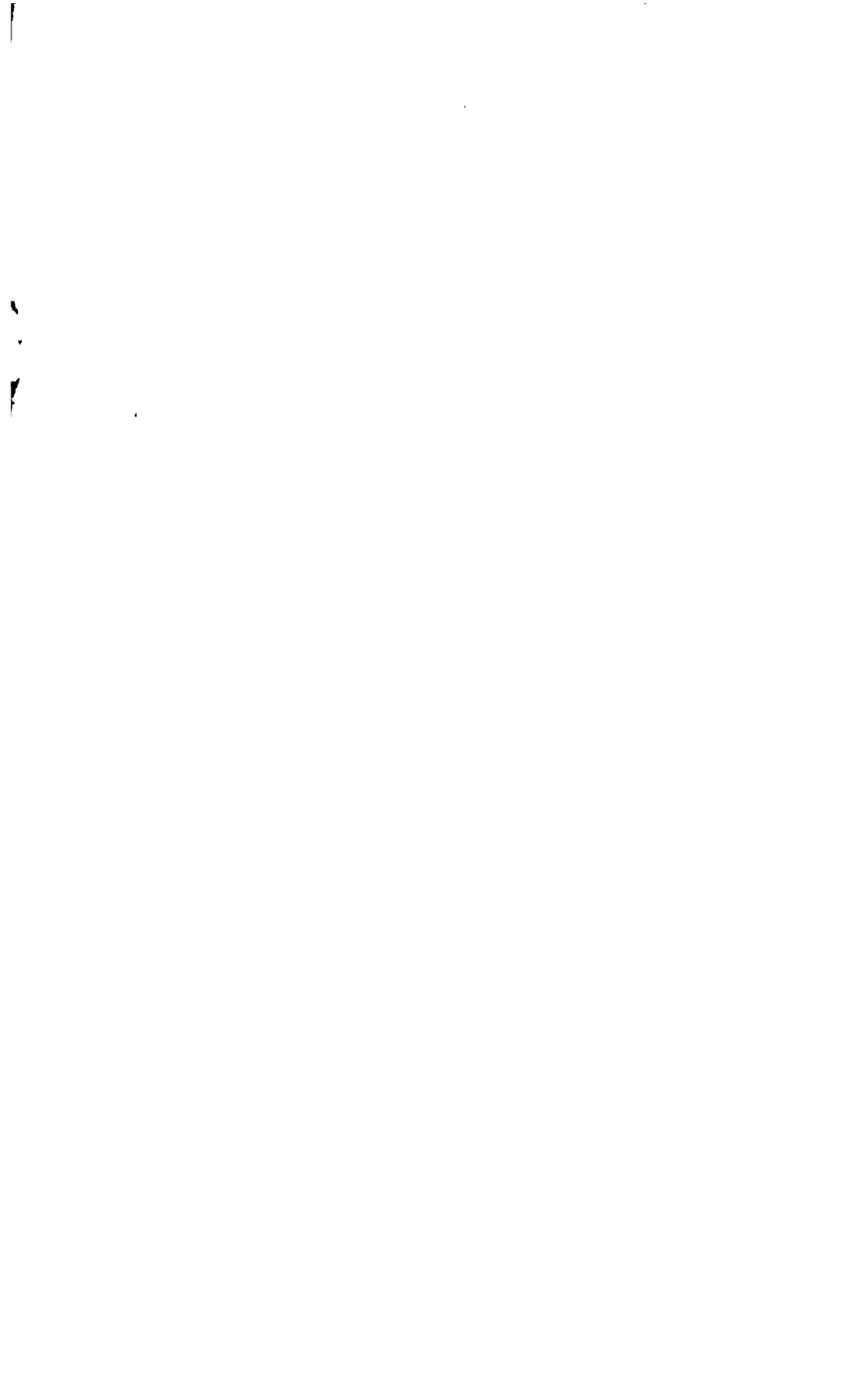
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